IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

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THE FREEPORT WATER COMPANY,
*Plaintiff in Error,*

*vs.*

THE CITY OF FREEPORT,
*Defendant in Error.*

Error to the Supreme Court of the State of Illinois.

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## BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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### I.

### STATEMENT OF THE CASE.

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MAY IT PLEASE THE COURT:

This cause, which comes before the court on a writ of error to the Supreme Court of Illinois, is an action of assumpsit brought by the Freeport Water Company, plaintiff in error, against the City of Freeport, defendant in error, for the price of water delivered by plaintiff in error to, and used by defendant in error, from and between January 1, 1896, and July 1, 1896.

The summons was made returnable to the September, A. D.

1896, term of the Circuit Court of Stephenson County, Illinois.

The declaration consists of two special counts and the common counts. The special counts set forth *verbatim* an ordinance passed by the common council of the City of Freeport on June 6, 1882.

So much of the ordinance as is material on this hearing is as follows:

"*Section 1.* Be it ordained by the city council of the City of Freeport: That there is hereby given and granted to Nathan Shelton or his assigns the exclusive right and privilege, for the term of thirty years from the first day of July, 1882, of supplying the City of Freeport, in the County of Stephenson and State of Illinois, and the citizens thereof, by a system of water works, with good, clear water suitable for domestic and manufacturing purposes, subject to the terms and conditions set forth in this ordinance. The source of supply of such water shall be the Pecatonica river above where any sewage or filth from Freeport enters the river. All said water shall be filtered."

*Section 2*, after providing for use of streets, etc., recites that

"The rights and liabilities provided for in this ordinance shall continue for a period of thirty years, *unless sooner* extinguished by *purchase*, as hereinafter provided."

*Section 4* provides for the character and capacity of the machinery and of the supply of water; the length and size of mains; the test to which the pipes shall be subjected prior to being laid; and that the capacity of such water works and supply "shall be increased as the growth of the city and its needs require."

In *Section 6* defendant in error reserves the right to acquire by purchase and become the sole owner of said water works, including all machinery, mains, pipes, buildings and property thereto appertaining at the expiration of thirty years from the

first day of July, 1882, upon paying to the owners the value thereof, to be ascertained by appraisement, and provides for the manner of appraisement and payment therefor.

"*Section 7.* The said Nathan Shelton or his assigns shall erect double nozzle fire hydrants upon all mains ordered laid by said city council in said city at the rate of not less than ten to each mile of said mains, and shall erect said fire hydrants whenever and wherever said city council shall direct. And said city shall pay to said Nathan Shelton or his assigns as an annual rental for the first *one hundred* of said hydrants the sum of *one hundred dollars* each; for all said hydrants over *one hundred* and up to *one hundred and fifty*, an annual rental of *eighty dollars* each, and for all of said hydrants over *one hundred and fifty* an annual rental of *fifty dollars* each; which said rentals shall be payable semi-annually on the fifteenth days of January and July in each year, and the pay of each hydrant shall commence when each hydrant is actually ready for use and the city officially notified thereof, *and shall continue during the full term specified in this ordinance unless said city shall sooner become the owner of said water works as hereinbefore provided, in which event said rental shall cease.*"

*Section 8* provides for the capacity and pressure required upon the completion of the works and as to the notice to be given defendant in error prior to its acceptance of the same.

"*Section 9.* The city shall have the right to use, free of charge, water from the hydrants on streets curbed and guttered for the purpose of washing and flushing the gutters and from any hydrant for the purpose of flushing any and all sewers in said city whenever the city council shall deem it necessary, for sanitary purposes, upon giving notice to the person in charge of said water works. The city shall have water free of charge for the use of the fire department, and for furnishing the city hall and the offices occupied for city purposes, for all public schools of the city, for all churches and for four public fountains *for drinking only* and one fountain in the public square or park, should the city erect the same."

*Section 10* provides that water rates shall not exceed the maximum rates to customers as in such section fixed, and that "rents for all other purposes not herein named will be fixed

by meter measurement, as may be agreed upon between the consumer and the water company, not exceeding the following meter rates" (specifying such rates).

*Section 11* provides that Shelton or his assigns shall extend mains in streets where no pipes are laid, as therein provided, and that the

"City shall have free and unobstructed use of all private hydrants, stop cocks or faucets in said city, for the purpose of extinguishing fires, free of charge to said city for such purpose."

*Section 12* provides that Shelton shall commence the erection of the water works within thirty days from July 1, 1882, and unless the same shall be completed before the 1st day of July, 1883, all rights and franchises therein granted should become null and void.

"*Section 13.* This ordinance shall become binding as a contract between the City of Freeport, Illinois, and Nathan Shelton or his assigns upon the filing with the city clerk of a written acceptance thereof by Nathan Shelton or his assigns, provided the same shall be done within thirty days from the passage and publication of this ordiance, *and this ordinance when so accepted shall not be altered, amended or changed in any way without the concurrence and consent of both parties thereto and interested therein or their successors or assigns.*"

The declaration then avers that said ordinance was duly accepted in writing by Nathan Shelton on June 7, 1882; that by such acceptance, defendant in error, on June 7, 1882, entered into a contract whereby it promised to pay said Shelton and his assigns an annual rental on the first 100 hydrants to be erected by him the sum of $100 each, and for all hydrants over 100, and up to 150, an annual rental of $80 each, payable semi-annually on the 15th day of January and July of each year; that on August 8, 1882, said Shelton assigned all his rights under such contract to plaintiff in error, of which fact defend-

ant in error had due notice; that plaintiff in error afterward completed such contract, and on the 18th day of December, A. D. 1882, the defendant in error thereupon accepted the same from plaintiff in error, as a full compliance with the terms of the said contract; that plaintiff in error has, since the completion and acceptance of said water works, in all things complied with said contract; that plaintiff in error constructed 121 hydrants as required by section 7 of said ordinance, and as ordered by defendant in error, and which hydrants were in operation on January 1, 1896; that defendant in error paid all rentals becoming due prior to January 1, 1896; that plaintiff in error had 121 such hydrants, which were in proper repair and fit for use, from January 1, 1896, until July 1, 1896, and that there was due on July 15, 1896, to plaintiff in error from defendant in error, for rent of such hydrants, the sum of $5,840.

Defendant in error filed two special pleas to the entire declaration.

These amended pleas recite, in substance, that the defendant in error was, on the 6th day of June, 1882, a municipal corporation organized under the general laws of the State of Illinois for the incorporation of cities and villages, and that, in pursuance of the statutes of said state relating to water works, passed said ordinance on June 6, 1882, and that said Shelton on the 7th day of June, 1882, accepted the provisions thereof.

That the water rates as fixed by the ordinance of June 6, 1882, were unjust, unreasonable and oppressive, and continued to so remain until the 10th day of February, A. D. 1896, when the city council, acting under its legislative capacity, and pursuant to the then-existing statutes of the State of Illinois relating to water works, caused to be enacted another ordinance whereby defendant in error re-adjusted and fixed such rates so as to make the same just, reasonable and fair, and that such or-

dinance was duly published, and on February 11, 1896, became a legal and valid enactment and was thereafter in force according to the terms and provisions thereof.

The ordinance of February 10, 1896, is set out *verbatim* in the first amended plea.

Said ordinance, so far as material, is as follows:

"*Section 1.* That the Freeport Water Company, a corporation now furnishing to the City of Freeport and its inhabitants water for fire protection, domestic uses and manfacturing purposes and other uses and purposes, shall be entitled to charge and receive therefor, and for the use of water meters, the rates and prices hereinafter fixed, and no more.

"*Section 2.* Said corporation shall be entitled to charge and receive from the City of Freeport for all water furnished for fire protection and other publ c uses and purposes, as hereinafter defined and enumerated, an annual rental or rate of *fifty* (*$50*) *dollars for each* double nozzle *fire hydrant* now in use in said City of Freeport, or any that may be ordered hereafter by the city council of the City of Freeport, such rental to be payable in semi-annual installments on the fifteenth (15th) day of January and July. * * * The above rate and rental shall be in full payment for all water furnished, as follows: For fire protection, including the furnishing and setting of fire hydrants for all water used by the fire department in extinguishing fires and in practice; for all water used by the committee on water for cleaning, washing, flushing gutters and sewers in said city, and for all water used for the city hall, fire and police stations and other city offices; for drinking fountains and fountain in park, when desired, and for all public schools and churches in the city."

*Section 3* establishes, in detail, maximum rates for water to be furnished for domestic uses, manufacturing purposes and other uses and purposes where furnished without meter.

(These rates are from 10 to 50 per cent. less than those established in the ordinance of June 6, 1882.)

"*Section 4.* Said corporation shall be entitled to charge and receive for water furnished for domestic uses, manufacturing purposes and other uses and purposes where such water is

furnished or measured by meter—the following rates shall be in full for water furnished for rent or for use of meter and for turning on and turning off water." (Rates given as established.)

(These rates are from 25 to 60 per cent. less than those established in the ordinance of June 6, 1882.)

"*Section 6.* Said corporation, so operating water works in the City of Freeport, shall be subject to the provisions of this ordinance, and said corporation and its officers, agents and employes wilfully charging or collecting for water furnished at a greater rate than is fixed in sections 3 and 4 hereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one ($1) dollar nor more than one hundred ($100) dollars and costs of prosecution."

*Section 7* repeals all ordinances and parts of ordinances inconsistent therewith.

"*Section 8.* This ordinance shall take effect and be in force from and after its passage and publication, provided that nothing herein shall be construed to abridge the power of the city council to further regulate or fix water rates and charges for the use of water meters."

The pleas further aver that said ordinance establishes water rentals for fire hydrants thereafter to be paid by defendant in error at the sum of $50 for each hydrant, payable at the same times as provided in the ordinance of June 6, 1882. That defendant in error paid plaintiff in error on the 10th day of July, 1896, for rentals due on February 11, 1896, at the rate provided in the ordinance of June 6, 1882, and for rentals since February 11, 1896, at the rate provided in the ordinance of February 10, 1896, the sum of $3,700, and that such sum of money so paid was all the money then due plaintiff in error as rentals for such hydrants. Plaintiff in error demurred to said amended pleas.

The Circuit Court overruled the demurrers to both pleas. Plaintiff in error stood by its demurrer. The Circuit Court thereupon rendered judgment in favor of defendant in error and against plaintiff in error.

Plaintiff in error then took an appeal from such judgment to the Supreme Court of Illinois.

The errors assigned on the record in the Supreme Court of Illinois, and which were relied upon by plaintiff in error, raised the question whether or not the ordinance of February 10, 1896, passed under the act of June 6, 1891;

(1) Was in violation of section 10 of article 1 of the constitution of the United States of America, which prohibits any state from passing any law which impairs the obligation of contracts; and,

(2) Whether such ordinance was in violation of section 10, article 14, of the amendments to the constitution of the United States of America, which forbids a state to pass any law depriving any person of his property without due process of law. (Rec., p. 28.)

The Supreme Court of Illinois, on June 21, 1900, affirmed the judgment of the Circuit Court of Stephenson County. (See *Freeport Water Co.* v. *City of Freeport*, 186 Ill., p. 179, and Rec., p. 31.)

Plaintiff in error sued out a writ of error to the Supreme Court of Illinois to reverse such judgment.

The errors assigned in this court are substantially the same as those assigned in the Supreme Court of Illinois.

## II.

## ERRORS ASSIGNED.

(1) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas of defendant in error, because the ordinance passed February 10, 1896, set forth in said pleas, is in violation of section 10 of article 1 of the constitution of the United States of America, which prohibits any state from passing a law impairing the obligation of contracts.

(2) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas of defendant in error, and each of them, because the ordinance passed February 10, 1896, set forth in said pleas, is in violation of article 1 of section 14 of the amendments to the constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

(3) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas, and each of them, of defendant in error, because the statute of the State of Illinois in force February 10, 1896, relating to "water works," in said pleas referred to, are in violation of section 10 of article 1 of the constitution of the United States of America, which prohibits any state from passing a law impairing the obligation of contracts.

(4) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas, and each of them, of defendant in error, because the statutes of the State of Illinois, in force February 10, 1896, relating to "water works," in said pleas referred to, are in violation of article 1 of section 14 of the amendments of the constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

(5) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to the amended first and second pleas, and each of them, of defendant in error, because the ordinance set forth in said pleas, and passed February 10, 1896, under and by virtue of the supposed authority of the then existing statutes of the State of Illinois relating to "water works," referred to in said pleas, and relied upon as the defense to said suit, impairs the contract made and entered into between Nathan Shelton, assignor of plaintiff in error, and the defendant in error, created by the ordinance in plaintiff in error's declaration mentioned, and the acceptance thereof, and by reason thereof is repugnant to section 10, article 1, of the constitution of the United States of America, which provides that no state should pass any law impairing the obligation of contracts.

(6) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling the demurrer of plaintiff in error to defendant in error's amended first and second pleas, and each of them, because the ordinance set forth in said pleas and passed February 10, 1896, under and by virtue of an act of the legislature of the State of Illinois, entitled "An Act to enable cities, towns, and villages incorporated under any general of special law of this state to fix the rates and charges for the supply of water furnished by any individual, company, or corporation to any such city, town, or village and the inhabitants thereof," approved June 6, 1891, being the statute of the State of Illinois then in force and referred to in said pleas and relied upon as a defense to said suit, impairs the contract made and entered into between Nathan Shelton, assignor of plaintiff in error, and defendant in error, created by the ordinance, and acceptance thereof, set forth in plaintiff in error's declaration, and by reason thereof is in violation of section 10, article , of the constitution of the United States of America, which provides that no state shall pass any law impairing the obligation of contracts.

(7) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling plaintiff in error's demurrer to defendant in error's amended first and second pleas, and each of them, for the reason that the ordinance of February 10,

1896, in said pleas mentioned, and passed under the supposed authority of the then existing statute of the State of Illinois relating to "water works," in said pleas referred to, is in violation of section 1, article 14, of the amendments to the constitution of the United States of America, which provides that no state shall deprive any person of its property without due process of law.

(8) The Supreme Court of the State of Illinois erred in affirming the judgment of the Circuit Court of Stephenson County, Illinois, overruling plaintiff in error's demurrer to defendant in error's amended first and second pleas, and each of them, for the reason that the ordinance of February 10, 1896, in said pleas mentioned, passed under and by virtue of the supposed authority of the legislature of the State of Illinois, entitled "An Act to enable cities, towns and villages incorporated under any general or special law of this state to fix the rates and charges for the supply of water furnished by any individual company or corporation to any such city, town, or village and the inhabitants thereof," approved June 6, 1891, being the statute of the State of Illinois referred to in said pleas, is in violation of section 1, article 14, of the amendments to the constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

(9) The Supreme Court of the State of Illinois erred in entering the judgment in favor of the defendant in error and against the plaintiff in error on the 21st day of June, A. D. 1900, in said cause, because the ordinance of defendant in error of February 10, 1896, and the statute of the State of Illinois on which said ordinance is based, being an act of the legislature of the State of Illinois passed June 6, 1891, and in force July 1, 1891, and each of them, are in violation of section 10 of article 1 of the constitution of the United States of America, in that it impairs the obligation of the contract between Nathan Shelton and the defendant in error set out in the declaration of plaintiff in error herein.

(10) The Supreme Conrt of the State of Illinois erred in entering the judgment in favor of the defendant in error and against the plaintiff in error, on the 21st day of June, A. D. 1900, in said cause, because the ordinance of defendant in error of February 10, 1896, and the statute of the State of Illinois on which said ordinance is based, being an act of the

legislature of the State of Illinois passed June 6, 1891, and in force July 1, 1891, and each of them, are in violation of section 1 of article 14 of the amendments to the constitution of the United States of America, in that it deprives plaintiff in error of its property without due process of law.

29137



## III.

## BRIEF OF THE ARGUMENT.

### I.

### A.

Defendant in error is liable in assumpsit for water furnished by plaintiff in error and used by defendant in error.

Dillon on Mun. Cor., 480.
Beach on Pub. Cor., §§ 821, 1333.
Field on Cor., §273.
*Hitchcock* v. *Galveston*, 96 U. S., 341.
*Daniels* v. *Tearney*, 102 U. S., 415.

### B.

This court will ascertain from the record, and determine for itself, whether or not the contract has been impaired within the meaning of the Federal constitution, or whether the party has been deprived of its property without due process of law.

*Swift* v. *Tyson*, 16 Pet., 1.
*Ohio Co.* v. *Debolt*, 16 How., 433.
*Bridge Proprietors* v. *Hoboken*, 1 Wall., 116.
*Bank* v. *Skelly*, 1 Black, 436.
*Butz* v. *Muscatine*, 8 Wall., 575.
*Delmas* v. *Merchants Insurance Co.*, 14 Wall., 661.
*Edwards* v. *Elliott*, 21 Wall., 549.

*Murray* v. *Charleston*, 96 U. S., 432.
*Northwestern University* v. *People*, 99 U. S., 309.
*Wright* v. *Nagle*, 101 U. S., 791.
*Railroad* v. *Palmes*, 109 U. S., 244.
*Railroad* v. *Dennis*, 116 U. S., 667.
*Clark* v. *San Francisco*, 124 U. S., 639.
*McGahey* v. *Virginia*, 135 U. S., 662.
*Huntington* v. *Attrill*, 146 U. S., 657.
*M. & O. R. R.* v. *Tennessee*, 153 U. S., 486.
*Scott* v. *McNeal*, 154 U. S., 34.
*C., B. & Q. R. R.* v. *Chicago*, 166 U. S., 226.
*McCullough* v. *Virginia*, 172 U. S., 110.
*Water Power* v. *St. Ry. Co.*, 172 U. S., 487.
*Western Union Tel. Co.* v. *Ann Arbor R. R.*, 178 U. S., 239.

C

*The ordinance of June 6, 1882, was not modified or repealed by the ordinance of February 10, 1896.*

(1) It was the duty of defendant in error under its implied powers to provide its inhabitants with a supply of water.

Dillon on Mun. Cor., § 146.
*Hardy* v. *Inhabitants of Waltham*, 3 Metc. (Mass.), 163.

(2) Defendant in error was acting under the provisions of the City and Village Act, of which fact the courts take judicial notice.

*Potwin* v. *Johnson*, 108 Ill., 74.
*Harman* v. *Chicago*, 110 Ill., 411.
*Rock Island* v. *Cuinely*, 126 Ill., 415.

(3) The legislature of Illinois has repeatedly recognized by course of legislation this implied power to contract for waterworks. Such legislative construction is entitled to great weight.

*People* v. *Hutchinson*, 172 Ill., 486.
*People* v. *Knopf*, 182 Ill., 165.
*Bank* v. *Collector*, 3 Wall., 195.
*Ex Parte Crow Dog*, 109 U. S., 556.
*Viterbo* v. *Freelander*, 120 U. S., 707.

D.

(1) Municipal corporations are invested with all powers necessary to carry out the provisions of the statute.

1 Dillon on Mun. Cor., §§ 89, 90, 443.
*City of Galena* v. *Corwith*, 48 Ill., 423.
*Montgomery Co.* v. *Barber*, 45 Ala., 237.
*Douglass* v. *Mayor of Virginia City*, 5 Nev., 147.

(2) Except where limited by the constitution the legislature is unrestricted in its sovereignty.

Cooley on Con. Lim., 87.

It is also settled that the legislature can delegate its power to a municipality.

Cooley on Con. Lim., 204.
Dillon on Mun. Cor., § 96.
*Wright* v. *Nagle*, 101 U. S., 791.
*New Orleans Water Co.* v. *City of New Orleans*, 164 U. S., 481.

*St. Ry. Co.* v. *Citizens Ry. Co.*, 166 U. S., 557.
*Penn Mutual Life Association* v. *Austin*, 168 U. S., 685.
*Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 9.

(3) Where authorized to make a contract, a municipal corporation may make a binding contract and insert proper covenants, the same as an individual under like circumstances.

15 Amer. Ency. Law, p. 1080.
*City of Quincy* v. *Bull*, 106 Ill., 351.

(4) Words and phrases are to be used in their ordinary meaning and to be construed according to the rules of grammar.

Endlich on Interpretation of Statutes, § 2.
Potter's Dwarris Statutes, 237.
Bishop on Written Law, §§ 92d, 93.
*U. S.* v. *Kirby*, 7 Wall., 482.
*Robertson* v. *French*, 4 East., 137.

(5) The grammatical construction of the statute is that the legislature intended that the municipality should make a contract for water rates at a fixed price for the entire period of thirty years authorized by the statute.

(6) The court should construe the statutes, when so capable of construction, so as to carry out the intention of the parties.

*Binghamton Bridge Co.*, 3 Wall., 51.
*City of Vincennes* v. *Citizens Gas Light Co.*, 132 Ind., 114.
*Tunneson* v. *Whitworth*, 117 U. S., 129.

The stipulation in this contract being that the rights under such ordinance "shall continue for a period of thirty years," and that such ordinance "shall not be altered, amended or changed in any way without the concurrence and consent of both parties."

(7) The legislature knew that parties would not contract to invest their money in expensive works for a long period of time without a fixed rate for the entire period, and the contract was entered into under such circumstances.

*Illinois Trust & Savings Bank* v. *City of Arkansas City*, 40 U. S. App., 257.
*Maine Water Co.* v. *City of Waterville*, 93 Me., 586.
*Little Falls Electric & Water Co.* v. *City of Little Falls*, 102 F. R., 663.
*Binghamton Bridge Co.*, 3 Wall., 51.

E.

In executing the contract under the ordinance of June 6, 1882, the defendant in error was acting in its capacity as a private corporation, and not in its public capacity as a sovereign.

(1) The establishment of water works pertains to a municipality as an individual, as distinguished from the state at large.

Dillon on Mun. Cor., § 58.
*People* v. *Herbert*, 24 Mich., 105.

(2) The city was acting, in making the contract, simply in its private capacity as an individual, and not as a sovereign.

1 Dillon on Mun. Cor., § 27.

15 Eng. & Amer. Ency. Law, 985.

*Hall* v. *Wisconsin*, 103 Wis., 5.

*Illinois Trust & Savings Bank* v. *City of Arkansas City*, 40 U. S. App., 257.

*City of Detroit* v. *Corey*, 9 Mich., 165.

*Gale* v. *Kalamazoo*, 23 Mich., 354.

*Western Savings Fund Society* v. *City of Philadelphia*, 31 Pa. St., 185.

*Cunningham* v. *City of Cleveland*, 98 F. R., 657.

*Indianapolis* v. *City of Indianapolis Gas Co.*, 66 Ind., 396.

*City of Newport* v. *Newport Gas Light Co.*, 84 Ky., 168.

*City of Greenville* v. *Greenville Water Works*, 27 Southern Rep., 764.

*City of Cincinnati* v. *Cameron*, 33 Ohio St., 336.

*Safety Insulated Wire Cable Co.* v. *Baltimore*, 13 C. C. App., 375.

*Little Falls Electric Light & Water Co.* v. *City of Little Falls*, 102 F. R., 663.

*Los Angeles City Water Co.* v. *City of Los Angeles*, 103 F. R., 730.

*Davis* v. *Gray*, 16 Wall., 203.

F.

(1) The great weight of authority is that when an expresss power is given to a municipality to contract or provide for water works, such municipality has the power to contract for fixed rate, and for a definite term.

*Atlantic City Works* v. *Atlantic City*, 48 N. J. Law, 378.

*Read* v. *Atlantic City*, 49 N. J. Law, 558.
*Ludington Water Supply Co.* v. *City of Ludington*, 119 Mich., 480.
*Cartersville Gas & Water Co.* v. *Mayor*, 89 Ga., 683.
*Grant* v. *City of Davenport*, 36 Ia., 396.
*Salena* v. *City of Neosho*, 127 Mo., 627.
*State* v. *City of Phillipsburg*, 23 Mont., 16.
*Crosby* v. *City Council of Montgomery* 108 Ala., 498.
*City of Greenville* v. *Greenville Water Works*, 27 So. Rep., 764.
*City of Indianapolis* v. *Indianapolis Gas Light & Coke Co.*, 66 Ind., 396.
*City of Connersville* v. *Connersville Hydraulic Co.*, 86 Ind., 184.
*City of Valparaiso* v. *Gardner*, 97 Ind., 2.
*City of Vincennes* v. *Citizens' Gas Light Co.*, 132 Ind., 114.
*City of Newport* v. *Newport Light Co.*, 84 Ky., 168.
*New Orleans Gas Light Co.* v. *The City of New Orleans*, 42 La. Ann, 188.
*City of Memphis* v. *Memphis Water Co.*, 5 Heisk., 529.
*Blood* v. *Manchester Electric Light Co.*, 68 N. H., 340.
*Andrews* v. *National Foundry*, 10 C. C. App., 60.
*Kimball* v. *City of Cedar Rapids*, 100 F. R., 802.
*Santa Ana Water Co.* v. *Town of San-Buenaventura*, 56 F. R., 339.

*Fergus Falls Water Co.* v. *City of Fergus Falls*, 65 F. R., 591.

*Los Angeles City Water Co.* v. *City of Los Angeles*, 88 F. R., 720.

*Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S., 558.

*Westerly Water Works* v. *Town of Westerly*, 75 F. R., 181.

*Defiance Water Co.* v. *City of Defiance*, 90 F. R., 753.

*South West Mo. Light Co.* v. *City of Joplin*, 101 F. R., 23.

*Little Falls Elec. & W. Co.* v. *City of Little Falls*, 102 F. R., 663.

*Insular Water Co.* v. *Baltimore*, 13 C. C. App., 378.

*State ex rel. City of St. Louis* v. *La Clede Gas L. Co.*, 102 Mo., 472.

*Livingston* v. *Pippin*, 31 Ala., 542.

*Rome* v. *Cabot*, 28 Ga., 50.

*Hale* v. *Houghton*, 8 Mich., 458.

*In re Pryor's Petition*, 55 Kas., 724.

*State ex rel.* v. *City of Great Falls*, 19 Mont., 518.

(2) The statutes passed at the session of the legislature of 1871 should be construed in *pari materia*.

Potter's Dwarris Statutes, 272.

Sedgwick Statute Law, 423.

1 Kent's Com., 463.

*Roche* v. *Smythe*, 13 Wall., 162.

*Northern Trust Co.* v. *Palmer*, 171 Ill., 383.

*South Park Commissioners* v. *First National Bank*, 177 Ill., 234.

(3) Having power to make such contract, the mode and manner is entirely within the discretion of the municipality, so long as (1) the rates are fixed by ordinance, and (2) the contract does not extend beyond thirty years.

*Grant* v. *City of Davenport*, 36 Ia., 390.
*City of Portland* v. *Portland Water Wks.*, 67 Me., 35.
*Maine Water Co.* v. *City of Waterville*, 93 Me., 586.
*City of New Orleans* v. *New Orleans Water Works*, 36 La. Ann., 432.
*Ludington Water Supply Co.* v. *City of Ludington*, 119 Mich., 480.
*Utica Water Co.* v. *City of Utica*, 10 Hun, 431.
*City of Livingston* v. *Pippin*, 31 Ala., 542.
*New Orleans Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S., 650.

G.

The statute of 1891 should be construed to relate solely to such contracts as might thereafter be executed.

(1) Shelton could rely upon the statutes as they then existed.

*Rowan* v. *Runnells*, 5 How., 134.
*Douglass* v. *County of Pike*, 101 U. S., 677.
*Louisiana* v. *Pillsbury*, 105 U. S., 278.

(2) The statute of 1891 is to be construed prospectively.

Potter's Dwarris Statutes (Ed. 1871), p. 162.
Cooley's Con. Lim. (2d Ed.) 370.
Morowitz on Corporations, §1110.
*Gage* v. *Stuart*, 127 Ill., 207.
*Bauer Grocery Co.* v. *Zelle*, 172 Ill., 414.
*Santa Ana Water Co.* v. *Town of San Buenaventura*, 56 F. R., 339.
*Rowan* v. *Runnells*, 5 How., 134.
*Douglass* v. *County of Pike*, 101 U. S., 677.
*Shreveport* v. *Cole*, 129 U. S., 36.

H.

The legislature having authorized the making of the contract of June 7, 1882, such contract must stand unless attacked for fraud.

Tiedeman on Mun. Cor., § 175.
Cooley on Con Lim., 186–7.
15 Amer. & Eng. Ency. Law, 1046.
*New Orleans Water Co.* v. *New Orleans*, 164 U. S., 481.
*Little Falls Electric Light Co.* v. *City of Little Falls*, 102 F. R., 663.
*Sherlock* v. *Village of Winnetka*, 59 Ill., 389.
*Dunham* v. *Village of Hyde Park*, 75 Ill., 371.
*Brush* v. *City of Carbondale*, 78 Ill., 74.
*Warren* v. *City of Chicago*, 118 Ill., 329.
*City of Newport* v. *Newport Light Co.*, 84 Ky., 108.
*City of Memphis* v. *Memphis Water Co.*, 5 Heisk, 529.

*Godson* v. *Winchester, etc.*, 12 Bush., 114.
*Von Ripen* v. *Jersey City*, 58 N. J. Law, 262.

I.

The ordinance of June 6, 1882, does not create a monopoly.

*New Orleans Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S., 650.
*Memphis* v. *Water Co.*, 5 Heisk, 529.
*B. & L. P. F. Co.* v. *Hawkey*, 31 Md., 339.
*Bartholomew* v. *City of Austin*, 29 Cir. Ct. App., 568.
*New Orleans Gas Co.* v. *New Orleans Light Co.*, 115 U. S., 650.
*St. Tammany, etc.*, v. *New Orleans Water Works*, 120 U. S., 64.
*Corcoran* v. *Lehigh & Franklin Coal Co.*, 138 Ill., 390.
*Bank of Hamilton* v. *Dudley*, 2 Pet., 492.
*Keokuk Packet Co.* v. *Keokuk*, 95 U. S., 80.
*Florida Cent. R. R.* v. *Schutte*, 103 U. S., 118.
*Town of Unity* v. *Burrage*, 103 U. S., 447,
*Vial* v. *Penniman*, 103 U. S., 714.
*Hills* v. *National Albany Exchange Bank*, 105 U. S,, 319.
*Evansville Nat. Bank* v. *Britton*, 105 U. S., 322.
*Presser* v. *Illinois*, 116 U. S., 252.
*Baldwin* v. *Franks*, 120 U. S., 678.

*Little Rock, etc., R. R.* v. *Worthin*, 120 U. S., 97.
*Field* v. *Clark*, 143 U. S., 649.
*Reagan* v. *Farmers L. & T. Co.*, 154 U. S., 362.

Defendant in error having been furnished water by the city, and used the same, is liable therefor under a *quantum meruit* (authorities, *supra*, p. 13), and the question of monopoly or exclusive license, therefore, does not arise in this case.

J.

In so far as the case of *City of Danville* v. *Danville Water Works*, 178 Ill., 299, holds to the contrary, it is opposed to the great weight of authority, and is founded on unsound reasoning.

(The authorities on which such case is founded distinguished, *infra*, p. 79.)

II.

A.

The ordinance of February 10, 1896, is in violation of the provision of section 10, article 1, of the constitution of the United States.

(1) The action of the common council, the defendant in error, is the action of the state.

*New Orleans Water Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S., 18.
*New Orleans Water Co.* v. *City of New Orleans*, 164 U. S., 481.
*City R. R. Co.* v. *Citizen's St. Ry. Co.*, 166 U. S., 557.

(2) Plaintiff in error, as assignee of Nathan Shelton, is entitled to all the rights acquired by Shelton.

2 Dillon Mun. Cor., 691.

*New Orleans Gas Light Co.* v. *Louisiana Light & Heat Co.*, 115 U. S., 650.

*Los Angeles* v. *Los Angeles Water Co.*, 177 U. S., 558.

*Santa Ana Water Co.* v. *Town of San Buenaventura*, 56 F. R., 586.

*Little Falls Electric & Water Co.* v. *City of Little Falls*, 102 F. R., 663.

*State ex rel. City of St. Louis* v. *LaClede Gas L. Co.*, 102 Mo., 472.

*In re Pryor*, 55 Kan., 724.

(3) Corporations are persons, and are within the provisions of the Federal constitution equally with individuals.

*Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S., 210.

*Minneapolis, &c., Ry. Co.* v. *Beckwith*, 129 U. S., 26.

*Charlotte* v. *Gibbs*, 142 U. S., 386.

*Smythe* v. *Ames*, 169 U. S., 522.

*Blake* v. *McClurg*, 172 U. S., 259.

(4) The right of Shelton under the contract of June 7, 1882, became a vested right.

Where an ordinance is repealed, such repeal cannot operate retrospectively to impair private rights vested under it.

Dillon on Mun. Cor., Sec. 314.

Thompson on Corporations, §5413.

Tiedeman on Police Power, §188.

Sinking Fund Cases, 99 U. S., 700.
*Pacific Mail Steamship Co.* v. *Joliffe*, 2 Wall., 450.
*Tomlinson* v. *Jessup*, 15 Wall., 454.
*Pearsall* v. *Great Northern R. R. Co.*, 161 U. S., 673.
*Holyoke Water Power Co.* v. *Lyman*, 15 Wall., 500.
*Close* v. *Glenwood Cemetery Co.*, 107 U. S., 466.
*Douglas* v. *Kentucky*, 168 U. S., 488.
*Commonwealth* v. *Essex Co.*, 13 Gray, 213.

The obligation of a contract is the law which binds a a party to perform his agreement.

(5) A contract between a state and an individual is as obligatory as any other contract.

*Piqua Bank* v. *Knopp*, 16 How., 369.
*Von Hoffman* v. *Quincy*, 4 Wall., 435.

(6) The state can do no act which impairs the obligation of a contract.

*Fletcher* v. *Peck*, 6 Cranch, 87.
*Dartmouth College* v. *Woodward*, 4 Wheat., 514.
*Green* v. *Biddle*, 8 Wheat., 86.
*West River Bridge Co.* v. *Dick*, 6 How., 523.
*Trustees Vincennes* v. *State of Indiana*, 14 How., 286.
*Chicago* v. *Sheldon*, 9 Wall., 50.
*Penna. College Case*, 13 Wall., 190.
*New Jersey* v. *Yard*, 95 U. S., 104.

*Pearsall* v. *Great Northern R. R. Co.*, 161 U. S., 647.
*Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 9.
*Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S., 558.
*Winter* v. *Jones*, 10 Ga., 190.
*Crosby* v. *City Council of Montgomery*, 108 Ala., 498.

B.

(1) Section 9 of the incorporation act does not apply to the contract of plaintiff in error, because it would be special legislation.

Section 23, article 4 of the constitution of Illinois (1 Starr & Curtis Stat., p. 134).
*R. R. Co.* v. *Jacksonville*, 67 Ill., 37.
*People* v. *Cooper*, 83 Ill., 585.
*Illinois Central Ry. Co.* v. *Bloomington*, 76 Ill., 447.
*Hawthorn* v. *People*, 109 Ill., 302.
*Eden* v. *People*, 161 Ill., 296.
*Lappmann* v. *People*, 175 Ill., 101.
*Barber* v. *Connelly*, 113 U. S., 27.
*San Diego Land Co.* v. *National City*, 174 U. S., 747.
*Williams* v. *Mississippi*, 170 U. S., 213.

(2) The act of 1891 does not purport to affect or modify the statute relating to corporations.

(3) There is nothing in the constitution or statutes of the State of Illinois by which the power to alter, amend, revoke or repeal is reserved to the legislature.

The right to repeal or amend statutes is now reserved in the constitution or statutes of most of the states by reason of the decision in the Dartmouth College case.

Such reservation should be expressed in the most explicit terms.

Morowitz on Corporations, § 1,108.

The reserved right to repeal cannot affect contracts already entered into.

*Curran* v. *State of Arkansas*, 15 How., 301.

*C. B. & Q. R. R. Co.* v. *Iowa*, 194 U. S., 155.

*Sinking Fund Cases*, 99 U. S., 710.

*Greenwood* v. *Union Freight R. R Co.*, 105 U. S., 13.

*Georgia R. R.* v. *Smith*, 128 U. S., 174.

*N. Y. & N. E. Ry. Co.* v. *Bristol*, 151 U. S., 567.

*Lake Shore R. R.* v. *Smith*, 173 U. S., 654.

*Citizens Water Co.* v. *Bridgeport*, 55 Conn., 1.

*Commonwealth* v. *Holyoke Water Power Co.*, 104 Mass., 446.

*Sage* v. *Dillard*, 15 B. Monroe, 341.

(4) Under the doctrine of *expressio unius* there is nothing in section 9 of the incorporation act which applies to the contract in question.

(5) The cases of *Spring Valley Water Works* v. *Schlotter*, 110 U. S., 347, and *San Diego Light Co.* v. *National City*, 174 U. S., 739, are not in conflict with our contention.

C.

The ordinance of 1896 was not passed under the police power of the state.

1 Dillon on Mun. Cor., § 142.
Cooley on Con. Lim., *p. 577.
*R. R.* v. *Maine*, 96 U. S., 511.
*Sinking Fund Cases*, 99 U. S., 700.
*New Orleans Gas L. Co.* v. *Louisiana Light &c. Co.*, 115 U. S., 650.
*New Orleans Water Works* v. *Reeves*, 115 U. S., 674.
*N. Y. & N. E. Ry. Co.* v. *Bristol*, 151 U. S., 567.
*Pearsall* v. *Great Northern Ry. Co.*, 161 U. S., 675.
*L. S. & M. S. Ry. Co.* v. *Smith*, 173 U. S., 689.

This, however, is no longer an open question in this court, as this court held in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 9, that a contract for the supply of water is not within the control of the state under its police power for the purpose of impairing or abrogating a contract.

III.

The effect of the ordinance of February 10, 1896, was to take the property of plaintiff in error without due process of law in violation of section 10, article 14, of the amendments to the constitution of the United States.

A.

(1) The establishing of rates is a legislative and not a judicial act.

2 Redfield on Rys., § 246.
*Dow* v. *Biddelman*, 125 U. S., 680.
*Chicago, etc.*, v. *Wellmann*, 143 U. S., 344.
*Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S., 399.
*Inter State Commerce Commission* v. *R. R. Co.*, 167 U. S., 499.
*Munn* v. *People*, 94 U S., 13.

(2) The constitution of Illinois provides that the powers of the government are divided into "three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others."

Starr & Curtis Stat., 117.

Under this provision, it has been held that the judiciary has no power to infringe upon what are legislative acts.

*Field* v. *People*, 2 Scam., 279.
*City of Galesburg* v. *Hawkinson*, 75 Ill., 152.
*Dodge* v. *Cole*, 97 Ill., 338.

The act of 1891 authorizing the judiciary to *determine* reasonable rates confers upon them *legislative* functions. This the legislature cannot do.

(3) It is a maxim of the law that "*nemo debet esse judex in propria sua causa.*"

Broom's Legal Maxims, 118.
Cooley's Con. Lim., 412.
12 Am. & Eng. Ency. of Law, 44.

This maxim applies to all matters and situations where one is appointed to decide between conflicting rights in which he is interested, and applies equally to the *legislative*, executive or judicial department of the government.

*Washington Insurance Co.* v. *Price*, Hopkins' Ch. 1.
*Sanborn* v. *Fellows*, 22 N. H., 473.
*Dimes* v. *Grand Junction Canal*, 3 House of Lords Cases, 759.
*State* v. *Crane*, 36 N. J. Law, 394.
*Ames* v. *Port Huron Log Driving & Booming Co.*, 11 Mich., 139.
*Stoddard* v. *Moulthrop*, 9 Conn., 502.
*Earle* v. *Stocker*, 2 Vernon, 251.
*Regina* v. *Recorder of Cambridge*, 8 E. & B., 637.
*Walcott* v. *Ely*, 2 Allen, 338.
*McGough* v. *Wellington*, 6 Allen, 505.

And it is not within the province of the legislature to authorize a court, municipality or any body of persons to act as judge or pass upon his own rights in a matter in which he is interested.

(4) The fourteenth amendment to the constitution of the United States is prohibitive against all forbidden acts of the state, whether through its legislative, executive or judicial authorities.

*Ex parte Virginia*, 100 U. S., 339.
*Virginia* v. *Reeves*, 100 U. S., 313.
*Neal* v. *Delaware*, 103 U. S., 370.
*Yick Wo* v. *Hopkins*, 118 U. S., 356.
*Scott* v. *Neal*, 154 U. S., 45.
*Gibson* v. *Mississippi*, 162 U. S., 579.
*Blake* v. *McClurg*, 172 U. S., 260.

B.

(1) The rights of plaintiff in error under the contract were property rights.

2 Kent's Com., 251.
*Sinking Fund Cases*, 99 U. S., 700.
*Rigney* v. *City of Chicago*, 102 Ill., 77.
*Chicago & Western Indiana R. R.* v. *Englewood*, 115 Ill., 385.

(2) Such property rights can only be destroyed or interfered with by due process of law, that is, according to the "law of the land,"—"according to those rules and forms which have been established for the protection of private rights."

*Lake View* v. *Rosehill Cemetry Co.*, 70 Ill., 198.
*Board of Education* v. *Blakewell*, 122 Ill., 348.
*Railroad Commission Cases*, 116 U. S., 331.
*Pompelly* v. *Green Bay Co.*, 13 Wall., 166.
*Monongahela Nav. Co.* v. *U. S.*, 148 U. S., 324.

(3) The property rights of plaintiff in error having been taken from it by the action of the State under the Act of 1891, without any compensation paid therefor, it was deprived of its property without due process of law.

*Henderson* v. *Ry. Co.*, 21 F. R., 358.
*Scott* v. *City of Toledo*, 36 F. R., 395.
*Baker* v. *Norwood*, 74 F. R., 997.
*Davidson* v. *New Orleans*, 96 U. S., 102.

*Kentucky R. R. Tax Cases*, 115 U. S., 331.

*C. B. & Q. R. R.* v. *Chicago*, 166 U. S., 226.

2 Story on Constitution (5th Ed.), p. 676, at pp. 702, 703, §1956.

1 Hare's American Constitutional Law, 347–8.

*Mount Hope Cemetery Co.* v. *Boston*, 158 Mass., 509.

*Harness* v. *C. & O. C. Co.*, 1 Md. Ch. Dec., 249.

*Martin et al.*, *ex parte*, 8 Eng. (Ark), 199.

## IV.

### STATUTES CITED.

"An Act to enable cities and villages to contract for a supply of water for public use, and to levy and collect the tax to pay for water so supplied."

(Approved April 9, 1872, in force July 1, 1872.)

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That in all cities and villages where water works may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages may contract with such incorporated company for a supply of water for public use, for a period not exceeding thirty years."

Public Laws of Illinois of 1871, p. 271.

"An Act to provide for the incorporation of cities and villages."

(Approved April 10, 1872, in force July 1, 1872.)

"Section 1. The city council or board of trustees shall have power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or water works."

Public Laws of Illinois of 1871, p. 259.

(1 Starr & Curtis' Stat., p. 785, § 175.)

"An Act to enable cities, towns and villages incorporated under any general or special law of this state to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof."

(Approved June 6, 1891; in force July 1, 1891.)

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That the cor-

porate authorities of the city, town or village, now or hereafter incorporated under any general or special law of this state in which any individual, company or corporation has been or hereafter may be authorized by such city, town or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the Circuit Court of the county in which such city, town or village may be."

Public Laws of Illinois of 1891, p. 85.

(1 Starr & Curtis' Stat., p. 868, § 458.)

"Sec. 9. The General Assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act: *And, provided, further*, that this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation."

(Section 9 Corporation Act; Starr & Curtis' Stat., p. 1006.)

## V.

## ARGUMENT.

### I.

### A.

There is no conflict as to the facts in this case. Plaintiff in error, it is admitted, has in all respects complied with the terms of the ordinance of June 6, 1882, in constructing the hydrants. It had constructed, on and prior to January 1, 1896, 121 hydrants, which were then, and continued until July 1, 1896, to be in proper condition, and fit for use. It furnished defendant in error all water through such hydrants which it was required to furnish under said ordinance. Defendant in error was in full possession of such hydrants, and has had full use of the water so furnished by plaintiff in error.

The only contention of defendant in error is, that the ordinance of February 10, 1896, should control as to the water rates to be paid for such hydrants, and that, having paid rental therefor for such period as provided in the ordinance of February 10, 1896, it had paid all sums due for such water rentals, and nothing remained unpaid therefor.

It is the admission of the pleas, that if the rates as established in the ordinance of June 6, 1882, should control, then there was due plaintiff in error for such water rents on July 1, 1896, the sum of $5,280.

The only question before the court is the effect of the ordinance of February 10, 1896.

If the ordinance of February 10, 1896, is void as in violation of section 10, article 1, of the constitution of the United

States, or section 1, article 14, of the amendments, to such constitution, and by reason thereof the ordinance of 1882 is not modified or repealed by such ordinance of 1896, then the plaintiff in error is entitled to recover in this action for the water furnished from January 1, 1896, to July 1, 1896, at the rates prescribed by the ordinance of June 6, 1882.

For as was said in the case of *City of East St. Louis* v. *East St. Louis Gas Light & Coke Co.*, 98 Ill., 427:

"What the city has received and enjoyed the benefit of under the contract, there is no principle of law which will justify it in its refusal to pay for."

Dillon on Mun. Cor., §480.
Beach on Public Cor., § § 821, 1333.
Field on Corporations, § 273.
*Hitchcock* v. *Galveston*, 96 U. S., 341.
*Daniels* v. *Tearney*, 102 U. S., 415.

B.

The first question that presents itself, is whether or not this court has jurisdiction.

It is well settled that this court will ascertain and determine for itself whether or not the contract has been impaired, within the meaning of the Federal constitution, or whether the party has been deprived of its property without due process of law.

*Swift* v. *Tyson*, 16 Pet., 1.
*Ohio Co.* v. *Debolt*, 16 How., 433.
*Bridge Proprietors* v. *Hoboken*, 1 Wall., 116.
*Bank* v. *Skelly*, 1 Black, 436.
*Butz* v. *Muscatine*, 8 Wall., 575.
*Delmas* v. *Merchants Insurance Co.*, 14 Wall., 661.
*Edwards* v. *Elliott*, 21 Wall., 549.
*Murray* v. *Charleston*, 96 U. S., 432.

*Northwestern University* v. *People*, 99 U. S., 309.
*Wright* v. *Nagle*, 101 U. S., 791.
*Railroad* v. *Palmes*, 109 U. S., 244.
*Railroad* v. *Dennis*, 116 U. S., 667.
*Clark* v. *San Francisco*, 124 U. S., 639.
*McGahey* v *Virginia*, 135 U. S., 662.
*Huntington* v *Attrill*,, 146 U. S., 657.
*M. & O. R. R.* v. *Tennessee*, 153 U. S., 486.
*Scott* v. *McNeal*, 154 U. S., 34.
*C. B. & Q. R. R.* v. *Chicago*, 166 U. S., 226.
*McCullough* v. *Virginia*, 172 U. S., 110.
*Water Power* v. *St. Ry. Co.*, 172 U. S., 487.
*Western Union Tel. Co.* v. *Ann Arbor R. R.*, 178 U. S., 239.

All that is required under the rules of practice of this court is, that it appear from the record "that a certain provision of the Federal Constitution or Act of Congress was relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied."

*Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116.

Such facts do appear upon the record.

C.

*The ordinance of June 6, 1882, was not modified or repealed by the ordinance February 10, 1896.*

(1) Plaintiff in error contends that the acceptance by Shelton of ordinance passed by the Common Council of the City of Freeport on June 6, 1882, constituted a valid contract impos-

ing upon Shelton and his assigns all the duties and obligations and giving them all the benefits and advantages to be derived from or accruing thereunder; and that the ordinance of the defendant in error of February 10, 1896, was in violation of Section 10 of Article I of the Constitution of the United States of America as impairing the obligation of contracts, and also in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States of America in depriving plaintiff in error of its property without due process of law.

No question is raised by defendant in error as to its power to pass an ordinance authorizing the execution of a contract for supplying the City of Freeport and its inhabitants with water for the term of thirty years. That it had such power is conceded.

Plaintiff in error contends that under the law and upon the construction of the statutes of the State of Illinois in force at the time the said ordinance of June 6, 1882, was passed and accepted, the defendant in error was authorized to pass an ordinance and enter into a contract thereunder fixing and establishing water rates and charges for the entire period of thirty years.

The contention raised by defendant in error being that while it admits it was vested with authority to pass an ordinance and enter into contract thereunder for thirty years, it had no power to establish such rates and charges for the entire period of thirty years, but that the rates to be charged for water to be supplied under the terms of such ordinance were subject to revision from time to time by ordinance of its Common Council.

We should determine first the powers of a municipal corporation as to providing water for corporate use, as well as for the use of its inhabitants.

Many authorities hold it to be the duty of a municipal cor-

poration to furnish a supply of water for itself and for its inhabitants, and this duty is an implied power and arises under what is known as the reserved police power.

"A city having power to pass ordinances respecting the police of the place, and to preserve health, is authorized, as sanitary and police regulation, to *contract* and procure a supply of water by boring an artesian well on the public square or otherwise, and *is the judge of the mode* best adapted to ac- the object."

Dillon on Mun. Cor., §146.
*Hardy* v. *Inhabitants of Waltham*, 3 Metc (Mass.), 163,

This *implied* power of a municipality to supply water was distinctly recognized by the legislature of the State of Illinois in 1872.

On the 22d of April, 1871, there was passed an Act entitled, "An Act in relation to the levy and collection of taxes for sewerage and *water works* in the cities of the state *that may have established a system* of sewerage and *water works* for such city." (Laws of Ill., 1871-2, p. 754.) This act provides that "The legislative authority of any such city *which now has*, or which may hereafter have, *established water works* for the supply of water to the inhabitants thereof, shall have power," etc., to annually levy a tax for the maintainance and extension of such water works. This statute applies to water works which have been constructed not under any express statute, as there was no statute expressly authorizing the construction of water works by individuals, but under the *implied* power of a municipality to construct such works. The legislature thus recognizes the legality of all water works theretofore "established" or constructed and the implied power vested in the municipality to establish such works.

But at the same session, however, the legislature of the

State of Illinois expressly authorized a municipality to contract for the erection of water works.

On the 9th of April, 1872, it passed an act which provides as follows:

"That in all cities and villages where water works may hereafter be constructed by an incorporated company, the city or village authorities in such cities and villages *may contract with such incorporated company* for a supply of water for public use for a period not exceeding thirty years."

And at the same session, such legislature passed an "An Act relating to cities and villages" which was approved April 10, 1872, and in force July 1, 1872, section 1 article 10 of which provides as follows:

"Section 1. The city council or board of trustees *shall have power to provide* for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water works, and to borrow money therefor and to authorize any person or private corporation to construct and maintain the same *at such rates as may be fixed by ordinance* and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water and injuries to such wells, pumps. cisterns, reservoirs or water works."

(2) The defendant in error, before the passage of the ordinance of June 6, 1882, adopted the provisions of the Act of 1872 relating to cities and villages.

That defendant in error did accept the provisions and acted under the provisions of such act is a fact of which the courts of Illinois took judicial notice.

*Potwin* v. *Johnson*, 108 Ill., 74.
*Harman* v. *Chicago*, 110 Ill., 411.
*Rock Island* v. *Cuinely*, 126 Ill., 415.

And such fact is admitted in the first amended plea.

These statutes passed at the session of the legislature of

1872 were all the laws of the State of Illinois relating to water works which were in force at the time of the passage and acceptance of the ordinance of June 6, 1882, and show that, to the extent of providing a supply of water for cities and villages the legislature delegated all power to the municipal authorities to do and perform all such acts as might be needful or necessary to carry out the powers contained in these statutes, and thus conferred upon them,

Under the act of April 9, 1872, municipal authorities were expressly empowered to "*contract * * * for a supply of water for public use*, for a period not exceeding thirty years." Under the act of April 10, 1872, such authorities were given "*power to provide for a supply of water*" * * * by the * * * construction of * * * water works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same *at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.*"

The legislature of Illinois has always recognized that providing a supply of water was one of the proper and usual powers of a municipality, and that it was the duty of a municipality to supply water.

In March, 1831, the legislature in an act providing for the incorporation of towns, it is recited that such municipality should have authority "to sink public wells, * * * to provide such means as they may deem necessary to protect such towns from injury by fires."

(Public Laws of Illinois of 1831, p. 84.)

This act was incorporated in the Revised Statutes of 1833.

(Public Laws of Illinois, 1833, p. 363.)

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It is a well known historical fact that prior to the adoption of the constitution of 1870 the legislature of the State of Illinois passed many special laws. In 1840 the legislature passed special charters for the cities of Springfield and Quincy. Section 8 of article 5 of the charter of the City of Springfield authorized such city "to provide the city with water, to dig wells and erect pumps in the streets for the extinguishment of fires and convenience of inhabitants."

(Public Laws of Illinois of 1839, p. 9.)

The charter of the City of Quincy contained identically the same power.

(Public Laws of Illinois of 1839, p. 116.)

Afterward, in 1849, the legislature passed another act to incorporate towns and cities which provided that all towns and cities incorporated under the general incorporation act should "possess all the powers authorized under the laws and amendatory acts incorporating either the cities of Springfield or Quincy."

(Section 4 Public Laws of Illinois of 1849, p. 224.)

And in 1855 the City of Freeport was incorporated by special act, wherein it was authorized "to provide the city with water, to erect hydrants and pumps, build cisterns and dig wells in the streets for the supply of engines and buckets."

(Private Laws of Illinois of 1855, p. 127, Section 8.)

The City and Village Act of 1872 was inserted bodily in the Revised Statutes of 1874. (Rev. Stat., 1874, p. 209—"Water." Sec. 169, p. 240.) It was not the intention to change the law relating to supply of water, but simply to codify the same and recognize the usual powers which were

passed by almost all legislatures, thus recognizing the duties and the implied powers of a municipal corporation as to furnishing a supply of water.

Similar provisions to those of the Illinois statutes relating to supplying water are found in the statutes of most of the states of the union.

The legislature of the State of Illinois, by this course of procedure, has recognized that it was the public policy of the state and duty of the municipalities under the general power for preservation of the health and comfort of its citizens, as well as providing against means for extinguishing fires, to provide a suitable water supply. This right, as we have seen, was not limited as to any particular *mode* or *manner* of providing for a supply of water. Those have been left entirely to the discretion of the municipality. They recognized that it was necessary to provide for water. They must have known that, with the advance in science and the improvements in machinery, the antiquated means of sinking wells to obtain water, and using buckets to extinguish fires, was no longer practicable. They must have known that large sums of money would be required to make such investments, in many cases beyond the power of a municipality to expend; that only where individuals would unite under the form of corporations could the money necessary to erect such improvements be obtained. That such corporations were organized is a matter of history. The books are full of cases involving construction of such contracts.

With this knowledge that municipalities did so contract, the repeated legislative construction by such enactments is entitled to very great weight, in showing that all powers necessary to carry out the provisions of the Act of 1872 to procure a supply of water were intended by the legislature to be given to the municipality.

*People* v. *Hutchinson*, 172 Ill., 486.
*People* v. *Knoff*, 183 Ill., 410.
*Bank* v. *Collector*, 3 Wall, 495.
*Ex Parte Crow Dog*, 109 U. S., 556
*Viterbo* v. *Frielander*, 120 U. S., 707.

D.

*Municipal corporations are, by the terms of these statutes, invested with all powers necessary to carry out such statute.*

(1) All powers necessary to carry out the provisions of the statutes not expressed therein are necessarily implied.

In Dillon on Municipal Cor., section 89, it is said:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First. Those granted in express words. Second. Those necessarily or fairly implied in, or incident to the powers expressly granted. Third. Those essential to the declared obligations and purposes of the corporation not simply convenient, but indispensible."

At section 90, it is said:

"And, therefore, it has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purposes of their creation which are reasonably proper to give effect to powers expressly granted."

"Where there are express provisions on the subject, these will, of course, measure as far as they extend the authority of the corporation. To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is indeed an implied or incidental authority to contract obligations."

Dillon on Mun. Cor., § 443.

This doctrine was early recognized in Illinois.

Says Mr. Justice BREESE, in *City of Galena* v. *Corwith*, 48 Ill., 423, when speaking of the power of a municipality:

"We believe it to be a well settled doctrine that corporations have all the powers of ordinary persons, as respects their contracts, excepting when they are expressly *or by necessary implication restricted*, and that they have all the power to carry out an expressly granted power."

The doctrine announced by Dillon in the text has been cited and approved in numerous of the cases cited in the note thereto, two of which are the following:

In *Montgomery Co.* v. *Barber*, 45 Ala., 237, where a county was declared by the statute to be a body corporate, the court say:

"As to all matters and things that properly appertain to a county, they have the same powers to contract and be contracted with as individuals. * * Where the mode and manner of contracting are not prescribed or the persons or agents by and with whom contracts are to be made, counties may make contracts in the same manner as individuals or other corporations."

Speaking of the power of municipal corporations, in *Douglas* v. *Mayor, etc., of Virginia City*, 5 Nev., 147, the court say:

"That a municipality like a trading corporation may, unless in some way restricted by charter, enter into any contract necessary to enable it to carry out the powers conferred upon it * * * or, in other words, that it has the right to adopt all the ordinary or usual means which may be necessary to the full execution or enjoyment of the power expressly given by its charter, is so firmly established by the authorities that at the present day it may be considered an elementary principle of the law of corporations (*Ketcham* v. *City of Buffalo*, 4 Kernan, 356.)"

(2) It is well settled that the legislature has all the powers of sovereignty except as limited by its constitution.

"In creating a legislative department, and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power, as it rests in and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose,

and to the limitations which are contained in the constitution of the United States."

Cooley on Con. Lim., *87.

It is also well settled that the legislature can delegate its power to a municipality.

Cooley on Con. Lim., 204.
D llon on Mun. Cor., § 96.
*Wright* v. *Nagle*, 101 U. S., 791.
*New Orleans Water Co.* v. *City of New Orleans*, 164 U. S., 481.
*City Railway Co.* v. *Citizens R. R. Co.*, 166 U. S., 557.
*Penn. Mutual Life Assn.* v. *Austin*, 168 U. S., 685.
*Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 7.

The power delegated by the legislature of this state to municipal corporations under the statutes of 1872 authorizing them to contract for a supply of water is plenary and unlimited, provided only that (1) the term of the contract does not exceed thirty years; and that (2) the rates are fixed by ordinance.

When the legislature, therefore, made this grant, it vested the common council and mayor of the City of Freeport with full power to make such terms as in their discretion, and within the said two limitations, they might deem best.

(3) The power so delegated by the state to the city was a power to make a *binding* contract the same as an individual could make under similar conditions.

"A municipal, like a trading or business corporation, may, unless in some way restricted by its charter or fundamental

law, enter into any contract necessary to enable it to carry out the powers conferred upon it."

15 Amer. Ency. Law, p. 1080.

Mr. Justice SHELDON says, in *The City of Quincy* v. *Bull*, 106 Ill., 351, when speaking of the charter of the City of Quincy, which authorized that city to provide its inhabitants with water:

"The power to make a contract, *but not to make a binding one, is unmeaning.* Where there is power to make a contract there is power to make one that shall bind. * * * The state itself may not revoke a grant it has made. The city must be bound by the contract and the grant it has made, and has authority to make the same as would an individual."

*Having authority to make such contract, the city had the same authority to make such covenants as were necessary for the full enjoyment of the power as an individual would.*

The constitution does not inhibit the legislature in its sovereign power from authorizing such grant or contract. The same authority of sovereignty gave the legislature power, not only to grant a right to contract for water-works for a fixed term, but also power to grant the right upon terms as to water rates and charges as the legislature or its delegate, the municipal corporation, might deem best. It was in the power of the legislature, when authorizing the execution of such contract, to have provided "such rates as may be fixed by ordinance," by adding thereto, "as the corporate authorities might, from time to time, deem just and reasonable." There would have been no controversy if some such expression had been used. The legislature did not so do, but authorized the execution of a contract (1), "at such rates as may be fixed by ordinance" at the time of making the contract—not by such ordinance as might be passed from time to time thereafter; or (2) in such *mode* and *manner* as to them in their sound discretion should seem best to provide for a supply of water for public use for thirty years.

(4) Plaintiff in error is not here seeking rights under a special statute which the courts would presume was drawn by it and therefore apply the doctrine of *strictissimi juris* in its construction, but is here under a general statute which, if the words are construed in their ordinary meaning and by their grammatical construction, must be construed as contended for by us.

Lord ELLENBOROUGH in *Robertson* v. *French*, 4 East., 137, said:

> "Words are to be understood in their plain everyday and popular sense unless they have acquired peculiar or technical meaning."

Statutes are construed the same way.

> "Words and phrases are to be used in their ordinary meaning and are to be construed according to the rules of grammar."
>
> Endlich on Interpretation of Statutes, Sec. 2.
> Potter on Dwarris Stat., 237.
> Bishop on the Written Law, §§ 92*d* & 93.
> *U. S.* v. *Kirby*, 7 Wall., 482.

(5) The Century Dictionary defines the word "and" as "A word connecting a word, phrase, clause or sentence with that which precedes it; a colorless particle, without an exact synonym in English, but expressed approximately 'with; along with; together with; besides; also; moreover; the limitations connected being *grammatically co-ordinate*.'"

Webster defines "and" as a particle which expresses the relation of connection or addition. It is used to conjoin a word with a word; a clause with a clause or a sentence with a sentence.

It is not necessary to define "co-ordinate," but Webster defines it "equal in rank or order—not subordinate."

The second clause, "and for a period not exceeding thirty years," is, therefore, co-ordinate with—that is, of equal rank

and dignity; equal power with—the first clause authorizing a municipality to execute a contract "at such rates as may be fixed by ordinance"; in other words, the grammatical language is, that the common council may authorize any person to construct water works at such rates as the council may fix by ordinance, and at the same time having fixed the rates by ordinance, such rates shall continue for a period not exceeding thirty years. Defendant in error does not seriously deny that the grammatical construction of the statute is as we contended, or seriously contend that the statute should not be construed to mean what it says, viz., fix the price of water by ordinance for the full term of thirty years It does contend, however, that the legislature did not intend to part with its reserved police power, because this was the public policy of the state. That the doctrine of police power does not apply to the facts as shown in the record, we have elsewhere fully established (*infra*, 107 ).

(6) This is the grammatical construction of the statute, and this, undoubtedly, is the way the legislature intended it should be understood.

In *Binghamton Bridge Co.*, 3 Wall., 51, Mr. Justice DAVIS, while recognizing the rule that where a charter is susceptible of two interpretations, that interpretation should be adopted which works the least harm to the state, says that:

"It should never be lost sight of, that the main canon of interpretation of a contract is to ascertain what the parties themselves meant and understood."

The same reasoning was applied by the court in the case of *City of Vincennes* v. *Citizens Gas Light Co.*, 132 Ind., 114, involving a gas contract, where the court say:

"It is the duty of the court, when the language of the contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves have put

upon the contract, and to enforce that construction has been so often asserted by this and other courts, that no doubt of its soundness can be entertained."

The same rule is applied to the construction of a statute which is as binding as a contract.

*Tennessee* v. *Whitworth*, 117 U. S., 129.

That the understanding of the parties was that the same rates should continue for the full period of thirty years is shown in the following provisions of the ordinance:

"Section 3. *The rights* and liabilities *provided for in this ordinance* shall continue for a period of thirty years unless sooner extinguished by the parties as hereinafter provided."

"Section 13. This ordinance, when so accepted, shall not be altered, amended or changed in any way without the concurrence and consent of both parties thereto, and interested therein, or their successors or assigns."

With the admitted authority of the legislature to delegate power to a municipal body to make a contract for thirty years, we might say (using the language of the court in *Illinois Trust & Savings Bank* v. *City of Arkansas City*, 40 U. S. App., 257):

"It is hardly possible that any individual or corporation could have been introduced to expend the thousands of dollars required to construct such works as have been built in this city in consideration of the right to use the streets of the city for that purpose, and of the promise of rental for its hydrants for the limited term of a single year. *These facts the members of the legislature must have known*, and they undoubtedly granted this plenary power to contract for the very purpose of enabling the cities to procure a supply of water for their inhabitants by grants of privileges to private parties to use their streets for that purpose for a reasonable term of years, and by covenants *to pay rentals* for hydrants *for a like term*."

On the same line, is the case of

*Maine Water Co.* v. *City of Waterville*, 93 Maine, 586.

where a city was authorized to, and did make a contract with a water company for twenty years, and as part of the compensation, the city covenanted that, in addition to the specified sum of money, they would pay another sum which amount equalled the amount of taxes that might be levied against the company's property, the court stated:

"We hold that a municipality may have a reasonably adequate consideration in the way of service rendered to it, for municipal purposes, agree to make compensation therefore for a term of years not unreasonably long, either in whole or in part by reimbursing the company in whole or in part, on the amount the company performing the service may be obliged to pay as taxes assessed upon this property," and upon the point made that such a contract was against public policy, they say: 'We do not think that the contract involved in this case is contrary to public policy. It is not for an unreasonably long period of time, and, in many cases, it is absolutely necessary for a city or town to make a water contract for a term of years in order to obtain the great benefits of a sufficient water supply for the protection of the property of its inhabitants against fire, to provide for the health of its citizens, by a proper sewerage system, and for other municipal purposes. Without a contract extending over a period of years, it would, we believe, frequently be the case that no individual or corporation could be found who would go to the expense of constructing a suitable and sufficient water plant that would answer the requirements for public purposes, as well as for domestic uses."

Says the court, in *Little Falls Electric & Water Co.* v. *City of Little Falls*, 102 Fed. Rep., 663:

"The capital invested in a water or light plant, is subject to hazards from elements and other damages, and is permanently expended, and no prudent person would make such an investment except upon a contract for a fairly long terms of years."

This idea was recognized in *Binghamton Bridge Co.*, 3 Wall., 51, where Mr. Justice DAVIS says:

"The legislature, therefore, says to public-spirited citizens,

if you will embark with your time, money and skill in an enterprise which will accommodate the public interests, we will grant you for a limited period, or in perpetuity, privileges that will justify expenditure of money and the employment of your time and skill. Such a grant is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

The *Binghamton Bridge Co.* was decided in 1865.

The legislature of Illinois is presumed to have passed such acts in view of such decision.

The legislature must have known, as stated in the Arkansas City case, that no person would have entered into this responsible undertaking with the uncertainty and prospect that the water rents might be reduced by the city in one or each succeeding year, or even before the time contemplated for the completion of the work, while the supply of water to be demanded by the city free of rent, and to be used by the city for municipal purposes, would be constantly increasing during the continued growth of the city for the full term of the thirty years.

The power to make a contract includes, as a necessary incident, the power to fix the rate at which water would be supplied. To bring such question beyond the doctrine of implied powers, and so that the subsequent authorities might know that the municipal council had such authority, the Illinois legislature, in the act of 1872, expressly authorized the city, by ordinance, to make such contract for thirty years, provided only that the rates should be established by ordinance at the time the contract was made.

The legislature, knowing that "without a contract extending over a period of years, * * * no individual or corporation could be found who would go to the expense of constructing a suitable and sufficient water plant that would answer the requirements for public purposes, as well as for

domestic uses," and when the legislature authorized the municipality to execute a contract relating to water works, and where it is evident from the stipulation in the ordinance that the parties understood and stipulated that the contract established the rates for the full period granted by the ordinance, the court should give that construction to the ordinance which it is evident the parties in their stipulation made for themselves.

E.

*The defendant in error, in executing the contract under ordinance of June 6th, 1882, was acting in its capacity as a private corporation, and not in its public capacity.*

(1) In construing this contract, the court should construe the same, not as a contract made by defendant in error in its sovereign capacity, but as made by it in its private or business capacity, the same as if made by an individual.

"The power of a municipality to make a contract for goods, city supplies for buildings, gas, sewer, water and the like, is neither a judicial nor a legislative power, but purely a business power.

The establishment of gas works; of *water works*; the construction of sewers and the like, are matters which pertain to the municipality as distinguished from the state at large."

Dillon on Municipal Cor. Sec. 58.

*People* v. *Herbert*, 24 Mich., p. 105.

(2) Contracts which a municipal corporation may make for the purpose of supplying its inhabitants with water relate to the "Things of Commerce," as distinguished in civil law from "Things Public," which are regulated by sovereign power. Such contracts are not made by the municipal corporation by virtue of its power of legal sovereignty, but in the capacity as a private corporation. To supply water to its

inhabitants is no more the duty of the sovereignty than to supply its inhabitants with sewers, gas, coal, or the children in its public schools with school books; all can be supplied by private individuals.

The character of the business of furnishing water is not in itself such a one which it is the duty of the state to create and maintain, and therefore one in which all the public have a right to demand and share in, as railroads or highways, whose use is public, because the public may create it. This public use is very different from a public interest in the use.

The prime element in a contract executed by individuals is that there should be a consideration. No contract could be enforced without a consideration. And, when empowering a municipality to make a contract, such power authorizes the making of a contract with all the incidents and characteristics of a contract by a private person. The consideration for this contract were the mutual covenants made by plaintiff in error with defendant in error in its capacity as a private corporation.

There is no greater sanctity attending a contract made with a municipality than one made with individuals.

The municipality in the case at bar was acting simply in the same capacity as any other private person or corporation. In making this contract, therefore, it stands upon the same footing as would any individual or body of persons under like circumstances.

1 Dillon on Mun. Cor., § 27.
15 Eng. & Am. Ency. Law, 985.

In *Hall* v. *Wisconsin*, 103 U. S., speaking of a contract executed by the governor of the state under an act of the legislature, Mr. Justice SWAYNE, when construing that statute, speaking for the court, says:

"When a state descends from the plane of its sovereignty,

and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and bound accordingly."

In *Illinois Trust and Savings Bank* v. *City of Arkansas City*, in 40 U. S. App., 257, the court say:

"The city has two classes of powers, the one legislative, public, governmental, in the exercise of which it has a sanctity and governs its people, the other is proprietary and *quasi* private, conferring upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality, and in the exercise of the former class it is governed by the ruling here invoked, and in their exercise it rules its people and is bound to transmit its power to its successive set of officers unimpaired, but in the exercise of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it might exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules which govern the private individual or corporation. * * * In contracting for water works to supply its inhabitants with water the city is not exercising its governmental or legislative powers, but its business or proprietary powers; the purpose of such a contract is not to goveru its inhabitants, but to obtain a private benefit for the city itself and its denizens. The act to establish water works is an act for the comfort of its citizens, and is not one of those acts which come within the power or duties incidental to a corporation. In making such contracts it acts as an individual, and under the same rule relating to contracts with individuals, and not otherwise."

Says COOLEY, J., in *Gale* v. *Kalamazoo*, 23 Mich., 354, that if a corporation possesses power to make such a contract:

"Its contract for that purpose would be binding upon it to the same extent as would be a contract of an individual in a matter pertaining to his private business; indeed, in providing its members with these convienences this corporation would be acting in no different capacity than would any private corporation in providing any convienence in the discharge of its corporate functions, and there can be no difference in the legal

rules which would be applicable. The legislative power of the village might be called in for the exercise in order to give to the corporation authority to contract, but in entering into the contract the village might be regarded as in the light of an individual proprietor."

As was said in the case of *City of Detroit* v. *Corey*, 9 Mich., 165, when speaking of a sewer:

"The sewers of a city, like its works for supplying the city with water, are the private property of the city. They belong to the city, the corporation and its incorporators. The citizens are alone interested in them. The outside public, as people of the state at large, have no interest in them, as they have in the streets of the city which are public highways."

This distinction is so clearly set forth in *Western Savings Fund Society* v. *City of Philadelphia*, 31 Pa. St., 185, that we may be justified in quoting therefrom the following:

"As a local sovereign, it (the city) has no authority to enter into business of manufacturing and selling gas; for its sovereignty did not extend to such subjects any more than it did to almost any other manufacture. * * *

When such a corporation engages in things not public in their nature, its acts as a private individual, *no longer legislates*, but contracts, and is as much bound by its engagements as is a natural person. The distinction between public and private duties is wide and obvious."

In the case of *Cunningham* v. *City of Cleveland*, 98 Fed. Rep., 657, the question arose as to the power of the municipality to make a contract for a fixed price of water for a long period of time, and the court, in its opinion, say:

"It is further urged that one board of mayor and aldermen, though having the right to contract for their own terms, may not bind their successors in office by such a contract in reference to the use of the streets and public franchises. The power conferred upon the board of mayor and alderman of the City of Cleveland by the amendment of its charter, stated above, is the power to contract for the city, that is, the power to bind more than the agents of the city during their official terms. It is the power to bind the corporation itself, *and con-*

*sequently all its future agents.* The distinction between an act which is purely governmental and legislative, and capable of amendment or revocation by the municipal legislature immediately after it is done, and that which is contractual and irrevocable, though effected through the medium of legislation, is well understood, and need not be dwelt upon."

See also:

*Indianopolis* v. *Indianapolis Gas Co.*, 66 Ind., 396.

*City of Newport* v. *Newport Gas L. Co.*, 84 Ky., 168.

*City of Greenville* v. *Greenville Water Works*, 27 So. R., 764.

*City of Cincinnati* v. *Cameron*, 33 O. St., 336.

*Safety Insulated Wire Cable Co.* v. *Baltimore*, 13 C. C. App., 375.

*Little Falls Electric Light & Water Co.* v. *City of Little Falls*, 102 F. R., 663.

*Los Angeles City Water Co.* v. *City of Los Angeles*, 103 F. R., 730.

In construing this contract, the court should construe it in the same manner as they would construe a contract between private individuals.

In *Davis* v. *Gray*, 16 Wall., 203, where a construction of a land grant was involved, the court, speaking of that contract, Mr. Justice SWAIN, delivering the opinion, says:

"When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances."

Construing the contract in the same manner as if the same were a contract between two individuals, force should be given to that part of the contract which establishes the uniform water rates for thirty years, and the covenants of the parties contained in the contract.

F.

*The great weight of authority is, that when express power is given a municipality to contract or provide for the erection of water works, such municipality has the power to contract for fixed rates and for a definite term.*

The extent of the authority of a municipality to pass such an ordinance has frequently arisen.

No case can be found where their being an *express* power granted to a municipality to contract for the erection of water works and the municipality having made a contract under such power, at a stated price, where the courts have not sustained such action.

In *Atlantic City Works* v. *Atlantic City*, 48 N. J. Law, 378, the charter provided:

"The common council of the city shall have authority to provide by ordinance for a supply of water for said city."

An ordinance was passed for the payment of water rates so long as the water company should comply with its terms. No time for the duration of the contract, or price, was fixed by statute. That ordinance provided for the payment of a specified sum semi-annually as rent for water for fire. The cause came up on demurrer to the complaint, and the court held that the contract continued so long as the plaintiff company should comply with its obligations.

This case was approved and followed in

*Reed* v. *Atlantic City*, 49 N. J. Law, 558.

In *Ludington Water Supply Co.* v. *City of Ludington*, 119 Mich., 480, a contract was made in 1882 for a period of thirty-two years, between the water works and the city, whereby the city agreed to pay $80 annual rental per hydrant. The ordinance was subsequently changed by consent of the parties, but the rates were still fixed.

The court say:

"To the extent that the contract of the city to take its supply of water from the plaintiff and pay for it, gave the plaintiff an advantage over others desiring to do business of like nature, it is a necessary and legitimate result of its right to contract. * * * It is also insisted that the clause in the contract agreeing to continue in force the schedule of prices for water furnished to private consumers is an abdiction of the governmental functions, such as the city may not deprive itself of by contract."

But the court held such contract valid.

In *Cartersville Gas & Water Co.* v. *Mayor*, 89 Ga., 683, the city entered into a contract with the water company for five years, under which the water company was to be reimbursed for the water used at a fixed rental for the entire period of the contract. Such contract was held valid.

In *Grant* v. *City of Davenport*, 36 Ia., 396, where all incorporated towns and villages were authorized to construct water works or procure individuals or corporations to construct and operate them "on such terms as might be agreed upon," it was held that it was competent for the municipality to so enact, and that a contract executed under such authority, for a period of twenty-five years at a fixed rental, was valid.

In *Salena* v. *City of Neosho*, 127 Mo., 627, where under the provisions of the revised statutes (section 1589 Mo., Revised Statutes 1889), incorporated cities were authorized "to contract with individuals or corporations for water supply," and in case the price was not fixed in the contract, the common council had authority to fix the price, it was held that a contract made for twenty years at a fixed annual rental was valid.

In *State* v. *City of Phillipsburg*, 23 Mon., 16, in a mandamus suit to compel the city to audit water bills of the water company, it was held that a contract covering a water supply for ten years at a fixed rental was valid.

In *Crosby* v. *City Council of Montgomery*, 108 Ala., 498, an agreement was entered into between the city and the water company in 1885. In February, 1887, the legislature passed an act authorizing the cities to regulate water rates. In 1889 the city passed another ordinance changing the rates. The court held that it could not do this, as the city had full power to make the contract under the statute.

In the case of *City of Greenville* v. *Greenville Water Works*, 27 So. Rep., 764, a municipality was authorized to enact such laws, not contrary to the Constitution, as they deemed necessary for the good order or health of the city.

The court held that it had the power to contract for a water supply and that it had the power to bind the city on that account for a reasonable time, if not for the whole period named in the ordinance, and sustained the contract which was made to cover a period of twenty-five years.

In *The City of Connersville* v. *Connersville Hydraulic Co.*, 86 Ind., 184, and in *The City of Valparaiso* v. *Gardner*, 97 Ind., 2, where the statute gave the board of water trustees the "management and control of all matters relating to the supply of water," it was held that they could make a contract for twenty years at a stipulated annual rental.

In *City of Vincennes* v. *Citizens' Gas Light Co.*, 132 Ind., 114, the court says:

"The making of contracts for the supply of light and water for a considerable time, at fixed prices, is ordinarily necessary and permissible. *Crowder* v. *Town of Sullivan*, 128 Ind., 486; *Citizens* v. *Town of Elwood*, 114 Ind., 332."

In *City of Indianapolis* v. *Indianapolis Gas, Light & Coke Co.*, 66 Ind., 396, where the general corporation act authorized cities, "to construct and establish gas works and to regulate the establishment thereof by individuals or companies," it was held that the city could exercise such power according to

its discretion. In that case an ordinance gave the gas company the right to furnish gas for the use of the city in a corporate capacity for a period of five years, with a proviso at the city's election to extend the contract for five years longer at an agreed fixed compensation during the entire period. The court say:

"Municipal corporations, besides the power to contract, which is generally granted to them within certain limits, have legislative or governmental powers by which they make by-laws to govern themselves, and pass ordinances to govern others, as the citizens of the towns or cities within their geographical limits. This power of legislation within the authority delegated to them by law is distinct from the power to contract, and although exercised by the same corporation they cannot by contract delegate or restrict their legislative power, nor can they merely by their legislative power make a contract. These two powers need not be confounded. The exercise of the legislative power requires the consent of no person, except those who legislate, while it is impossible to make a contract without the consent of another or others. We think, therefore, that when the City of Indianapolis made the contract in question with the gas light company it made it in exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make a contract was authorized by an ordinance, and having the power to make a contract touching the subject-matter, it had a right to make it according to its own discretion as to its prudence and good policy within the limits of the franchise. Nor can we see that the contract in the least restricts the legislative power of the city, except that as the sanctity of the contract is shielded by the constitution of the United States, it cannot in the exercise of its legislative power impair its validity, and it would be a solecism to hold that a municipal corporation can impair the validity of a contract when the state which created the corporation by its solemn act has no such power."

* * * * *

"A municipal corporation not having either body, limbs, feet nor hands, but being merely a legal entity, cannot execute its own acts or administer its own affairs. To do this it must employ persons, other corporations or agencies of some kind;

and to employ them, and agree to pay them, is to make a contract, and if it could not make such contracts, and was not bound thereby, it could not carry on the purpose or attain the objects for which it was established. This ordinance will not execute itself, and to deny it the power to have them executed would be to render it useless and helpless. When it makes a contract within the scope of its power—not *ultra vires*—which is not against public policy, and not fraudulent, it must be enforced the same as a contract of a business corporation or person. * * * The authorities upon the question are too numerous to notice in detail, but we think their main current supports the view we have taken in this opinion. Nor do we think that upon principle they are seriously conflicting. The apparent conflict arises from applying the language generally, when it was meant to apply only to some particular municipality."

In *City of Newport* v. *Newport Light Co.*, 84 Ky., 168, where the City of Newport was authorized to construct, maintain and operate gas works and pass all ordinances necessary to regulate the same, the court say:

"It is purely a question of contract if the City of Newport had the right to contract with the appellee to furnish gas to the city and to such of its inhabitants as might desire to use it. The contract should be enforced, and neither the city nor any individual or corporation can interfere with its rights. * * * The city has exhausted its power and done that which under legislative authority it had the right to do. * * * We interpret this class of contracts and the legislation under which they are made, as in all other cases of contract, in the light of reason and with a view of carrying into effect the legislative intent. The exercise of the franchise was necessary to accomplish the object in view, and it was indispensable to enable the appellee to comply with its terms, and no individual or corporation would have invested such a large sum of money as is conceded was necessary, with the privilege on the part of the council to abandon its terms in part. * * * The contract with the corporation is as inviolable, and the rights to contract exists as with natural persons, and the city council of Newport, looking to the comfort and convenience of its population and the public welfare, has contracted with appellee to furnish gas for a fixed period. There is no pretense that any

of its provisions have been violated by the appellee or that it has any of the elements of fraud or mistake fatal to any contract, and, therefore, the law should recognize its validity and enforce its obligation."

In *New Orleans Gas Light Co.* v. *The City of New Orleans*, 42 La. Ann., 188, where the statute provided that

"The council shall have power, and it shall be their duty to pass such ordinances, and to see to their faithful execution, as may be necessary and proper, * * * to light the streets, wharves, landings and public squares."

The court say: "That clause of itself contains no limitation or restriction to the power therein conferred in general and sweeping terms. * * * By entering into a contract for more than one year for a commodity or other supply, the City Council is not amenable to the charge that it restricted its legislative power.

The power to legislate conferred on the city by its charter has reference to its authority to legislate for governmental functions, such as passing and enforcing ordinances to govern itself and others, under what is known as its police power; and it is distinct from the power to contract, which is similar in its effects to the right of contracting as exercised by natural persons. Hence, the rules of law and the principles settled in jurisprudence, which prohibit municipal corporations from legislating future restrictions to its own legislative power, are not applicable to a time contract entered into by such a corporation. * * * The rule as established by jurisprudence seems to be that, in the absence of special legislative prohibition or restriction, a municipal corporation, vested with a general power to make a contract for the supply of gas or any other commodity has the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise, including the power to make it for more than one year, if by thus contracting it believes that better terms or lower rates can be obtained.

After a thorough examination of our legislation on the subject, and an exhaustive study of our own reports, we find no law, reason or authority which would justify us in removing the present case from the effect of this general rule. * * *

When the power is once shown to exist in the municipal corporation courts are powerless to regulate its exercise or to dic-

tate what particular contract should or should not be made or justified."

And it was there held, in the absence of express authority, the city could make a valid contract at a fixed rate for a period of four years.

In *City of Memphis* v. *Memphis Water Co.*, 5 Heisk, 529, the court say:

"The nature of water works to supply a city and its inhabitants with water, falls naturally and legitimately within the powers of its charter of incorporation, and the exercise of this power, within the limit of its charter, needs no enabling act of the legislature."

The law relating to this case is nowhere more clearly stated than in *Blood* v. *Manchester Electric Light Co.*, 68 N. H., 340, 335, where the statute provided that a municipality could "make any contracts which may be necessary and convenient for the transaction of the public business of the town," the court say:

"No limitation is put upon this power in reference to the lighting of streets that does not pertain to it in reference to other subjects. A town has as complete power to contract for lighting its streets as for building its highways or other public works. The only limitation is the general one that the contract shall be 'necessary and convenient' for the transaction of the town's business. This is simply a declaration of the common law, applicable to all corporations, public as well as private, confining their powers to contract to those subjects which are necessary and proper to enable them to fulfill the object of their incorporation. The city councils of Manchester were authorized to exercise the powers of the corporation, namely, 'all the powers vested by law in towns or in the inhabitants thereof.' Pub. St. c. 50, § 1; Laws 1846, c. 384, § 14. This language excludes all ground for believing that the legislature intended to limit the authority of the councils so that they could not bind the corporation beyond the unexpired part of their term of office. The legislature would not leave such intention to be inferred from language which conveys no suggestion of

the limitation. The necessity for continuity in the operations of the government is a reason why there should be no such limitation. The agencies of the government change, but the government goes on without interruption. The authority of the city councils while in office being co-extensive with the powers of the city or its inhabitants, the limitation in their term of office is immaterial in the decision of the question under consideration. The contract stands the same as if it had been made by a vote of the inhabitants acting under a town organization.

It is claimed by the plaintiffs that a town cannot bind itself by a contract for a term of years, because it would disable the town from performing its legislative functions to their full extent for the time being. If this were so, a town's power to contract would be nominal, rather than real. It would not answer the requirements of its business. If a town could disregard its contracts at will on the ground that it has no power to bind itself beyond the moment employed in making them, people would be reluctant to enter into contracts with it. A person would not ordinarily risk his labor and money in ventures so precarious, certainly not unless the compensation corresponded to the risk. For example, if the city council of Manchester had been able to induce any one to light its streets for a time to be measured by their will, and to furnish the necessary apparatus and fixtures for so doing (which is exceedingly doubtful), they would have been able to do it only upon payment of a large price, much larger than would have been necessary if the time of the service was fixed by the agreement of the parties. Moreover, a service depending upon such a contract would be unreliable, and subject to constant interruptions, and would not meet the public needs.

The reason assigned for the disability alleged is not sound. In making contracts, a town or city does not act in its legislative capacity, but in what is termed for the sake of distinction, its private capacity. 1 Dill. Mun. Corp., § § 27, 39. In this capacity it resembles an individual or private corporation; and its contracts have the same binding force upon it that the contracts of individuals and private corporations have upon them. (*Greenland* v. *Weeks*, 49 N. H., 472, 480, *et seq.*; *South Hampton* v. *Fowler*, 52 N. H., 225, 231; *Small* v. *Inhabitants of Danville*, 51 Me., 359, 361), and are equally

protected by the Federal constitution from impairment by subsequent legislation on the part of either the state or the town. (*Fletcher* v. *Peck*, 6 Cranch, 87; *Gale* v. *Village of Kalamazoo*, 23 Mich., 344; *City of Indianapolis* v. *Indianapolis Gaslight & Coke Co.*, 66 Ind., 396, 26; *City of Valparaiso* v. *Gardiner*, 97 Ind., 1; *New Orleans M. & C. R. Co.* v. *City of New Orleans*, 26 La. Ann., 478, 481; *Philadelphia* v. *Fix*, 64 Pa. St., 169; *Western College* v. *Cleveland*, 12 Ohio St., 375, 377; 1 Dill. Mun. Corp., § § 66 *et seq.*, 116.) The city council in exercising the powers of the city could determine the kind of lights to be used for lighting the streets, their location, when they should be lighted, and all other details of the business. They had power also to determine the length of time a contract for lighting should continue, in view of the necessity and convenience of the service required. If they in good faith exercised the discretion lodged with them, their contract is a legal contract, and will bind the city the same as a similar contract made by the directors of a private corporation binds it. *Dibble* v. *Town of New Haven*, 56 Conn., 199, *Putnam* v. *Grand Rapids*, 58 Mich., 416, 419."

*Andrews* v. *National Foundry*, 10 C. C. App., 60, where the charter authorized the city "to provide for the erection of water works for a supply of water to the inhabitants of a city," the court held: "Such authority extended to any reasonable method" the city might adopt, and upheld a time contract made by the city for such supply.

While the question was not squarely in point, still the court in *Kimball* v. *City of Cedar Rapids*, 100 Fed. Rep., 802, held that the city was authorized under a statute authorizing cities to contract for water, to make a contract for a period of twenty-five years.

In *Santa Ana Water Co.* v. *Town of San Buenaventura*, 56 Fed. Rep., 339, the court says:

"The power conferred by the legislature upon the board of trustees of a municipality to provide for the prevention and extinguishment of fires and to provide the town with fresh water necessarily carried with it the implied power to make any

and all proper contracts to accomplish those ends. There was no constitutional inhibition against such grants of power, and it was, therefore, not only within the province of the legislature to make the grant, but, having deemed it wise to make of the town a municipal corporation, it was appropriate, and indeed necessary, that provision either be made directly by the legislature for the supply of the town and its inhabitants with fresh water, or that such power be delegated to the governing body of the municipality."

In *Fergus Falls Water Co* v. *City of Fergus Falls*, 65 Fed. Rep., 591, where a city was authorized "to contract * * * to supply the city with water," and the statute was silent as to the price or time, and a contract was made for thirty years at a rental of $80 per hydrant, the court held such contract valid, and says:

"The law does not favor the idea that a man shall abide by a contract when it is advantageous to him, and repudiate it when it becomes irksome. It is well settled that time and even exclusive contracts may be made by city authorities for the purpose of inducing persons to embark capital in such enterprises as water or gas works, and common sense and experience teach us that without such provisions capital would not be invested. * * * When the city received power from the legislature to contract for water works, the power to make necessary and proper arrangements to provide for the payment for the same was also granted."

In *Los Angeles City Water Co.* v. *City of Los Angeles*, 88 Fed. Rep., 720, speaking of a grant to supply a city with water, the court says:

"The words of the grant in the case at bar, 'power * * * to provide for supplying the city with water,' are clear and unambiguous, and, in my opinion, admit of no other reasonable construction than that they were intended to confer upon the City of Los Angeles, so far as concerns the means necessary to supply the city with water, powers as ample as the legislature itself possessed. This delegation of power to the city was not, of course, a relinquishment by the legislature of its control over the subject. The legislature could at any time revoke the

power delegated to the city and provide directly, through agencies of it own selection, for supplying the city with water, provided such revocation or provision should not impair any previously vested rights."

And after discussing the question whether or not such power is a business or proprietary power as distinct from a governmental or legislative power, the court further say:

"If, however, it be conceded, contrary to these authorities, and as claimed by defendants, that the power of a city to regulate water rates is legislative or governmental, the city may, by contract, abridge such power under an implied as well as an express legislative grant; and this rule is recognized by many of the authorities upon which defendants rely. Thus, in one of them, it is said:

'Powers are conferred upon municipal corporations for public purposes; and as their legislative powers cannot, as we have just seen, be delegated, so they cannot, without legislative authority, express or implied, be bargained or bartered away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.' * * * 1 Dill. Mun. Corp. (4th Ed.), § 97.

It is worthy of note that the words 'without legislative authority, express or implied,' are not found in the first three editions of Judge Dillon's work. I take it, therefore, that a review of the subject made by him subsequent to said editions satisfied him that the governmental as well as business powers of a city could be abridged by contract if there were legislative authority therefor, and that such authority could arise by implication as well as by express grant."

This case came to this court on appeal and was affirmed.

*Los Angeles* v. *Los Angeles City Water Works Co.*, 177 U. S., 558.

See, also,

*Westerly Water Works* v. *Town of Westerly*, 75 F. R., 181.

*Defiance Water Co.* v. *City of Defiance*, 90 F. R., 753.
*South West Mo. Light Co.* v. *City of Joplin*, 101 F. R., 23.
*Little Falls Elec. & W. Co.* v. *City of Little Falls*, 102 F. R., 663.
*Insular Water Co.* v. *Baltimore*, 13 C. C. App., 378.
*State ex rel.* v. *City of Great Falls*, 19 Mon., 518.
*State ex rel. City of St. Louis* v. *La Clede Gas L. Co.*, 102 Mo., 472.
*Livingston* v. *Pippin*, 31 Ala., 542.
*Rome* v. *Cabot*, 28 Ga., 50.
*Hale* v. *Houghton*, 8 Mich., 458.
*In re Pryor's Petition*, 55 Kas., 724.

Many other cases relating to powers of municipalities as to contracting for water works, which might be cited, clearly establish the doctrine that where a municipality is authorized to establish water works, either by itself or through the instrumentality or aid of third persons, this power confers upon them an express power under which, in its discretion as to the mode and manner they may make contracts, not only for a fixed period, but also for a fixed price for the entire period. That this is the construction to be placed upon the acts of the legislature of the State of Illinois seems to us to be fully expressed by the action of that body at the same session in not only recognizing the implied power of a municipality to construct works, but by two separate acts expressly impowering such body not only "to provide for a supply of water," but also "to make a contract for water at a price fixed by ordinance, and for a period of thirty years."

29166



These acts being passed at the same session of the legislature are *in pari materia*, and, should be construed together.

Potters Dwarris Statutes, 272.
Sedgwick Statute Law, 423.
1 Kent's Com., 463.
*Reiche* v. *Smythe*, 13 Wall., 162.
*Northern Trust Co.* v. *Palmer*, 171 Ill., 383.
*South Park Commissioners* v. *First National Bank*, 177 Ill., 234.

The courts have held that where a municipality has power to contract for a supply of water, that their discretion goes to such an extent that the city may, in consideration of furnishing the city with a free supply of water for municipal purposes, exempt such works from the payment of taxes for the full term of the contract.

*Grant* v. *City of Davenport*, 36 Ia., 396.
*City of Portland* v. *Portland Water Works*, 67 Maine, 35.
*Maine Water Co.* v. *City of Waterville*, 93 Me., 586.
*City of New Orleans* v. *New Orleans Water Works*, 36 La., 432.
*Ludington Water Supply Co.* v. *City of Ludington*, 119 Mich, 480.
*Utica Water Works* v. *City of Utica*, 10 Hun., 431.

This right of a municipal corporation to grant an exemption from taxation for a valid consideration at the time advanced, or to be thereafter performed, was recognized by this court as valid in *New Orleans Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S., 650, where Mr. Justice HARLAN, delivering the opinion, cites numerous cases to that effect, and says :

"If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations, *it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law*—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies."

The principle is clearly stated in the *City of Livingston* v. *Pippen*, 31 Ala., 542, where the city was authorized to "pass all ordinances that shall be necessary for the security and welfare of the inhabitants thereof, and for preserving health," etc., and made a contract for building an artesian well. The point being raised that the city had no authority to make such contract, the court say:

"Nothing is more important as a sanitary and police regulation than an abundant supply of water. * * * The corporate authorities having the power to procure a supply of water, were themselves the judges of the *mode and manner* best calculated to accomplish that object."

Doubtless nnmerous cases will be cited in support of the proposition that the contract entered into under the ordinance of June 6, 1882, is invalid in so far as it attempts to bind the corporation as to the price of water beyond the term of the then members of the city council, but a careful examination of those cases will show that the doctrine contended for by us is the correct one; or, as stated in the case of *City of Indianapolis* v. *Indianapolis Gas Light and Coke Co.*, *supra*, when speaking of the authorities on this point:

"We think their main current supports the view we have taken in this opinion, nor do we think that upon principle they are seriously conflicting. The apparent conflict arises from applying the language *generally* when it was meant to apply only to *some particular* municipality."

G.

*The statute of 1891 should be construed to relate solely to such contracts as might thereafter be executed.*

We have elsewnere shown that the rights acquired by Nathan Shelton and assigns under the ordinance of June 6, 1882, became a vested right, at the time of entering into such contract.

Nathan Shelton and his assigns could rely upon the statutes as they then existed.

*Rowan* v. *Runnels*, 5 How., 134.
*Douglass* v. *County of Pike*, 101 U. S. 677.
*Louisiana* v. *Pittsburg*, 105 U. S.,278.

As was said in *Santa Anna Water Co.* v. *Town of San Buenaventura*, 56 F. R., 339, where speaking of the contract made between the city and Arnaz:

"Arnaz and his assigns were individual citizens. They were not in any way bound to enter into the contract with the board of trustees of the town. By the exercise of none of its prorogatives as a governing power, could the municipality compel them to do so. The contract required their assent as well as that of the board of trustees. Of course in entering into it, they did so subject to existing laws, but no then existing law has been pointed out, reserving to the state or the municipality the power to fix the water rates the town through its board of trustees contracted should be fixed by Arnaz and his associates."

"It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively."

Cooley on Con. Lim. (2d Ed.), 370.

See, also,

Morowitz on Cor., §1110.

"It is the general law, say the books, that no statute is to have a retrospection beyond the time of its commencement for the rule and law of parliament that *nova constitutio futuris formam debet imponere*, and not only is this the doctrine of the English law, that the statute is not to have a retrospective effect, but is also founded on principles of general jurisprudence. A retrospective statute would partake in its characteristics of the mischief of *ex post facto* law as to all cases of crimes and penalties; and in matters relating to contracts and property would violate every sound principle.

Potter's Dwarris, Statutes (Ed. 1871), 162.

*Sinking Fund Cases*, 99 U. S., 700.

*Douglas* v. *Kentucky*, 168 U. S., 488.

"The rule is that statutes are prospective, and will not be construed to have retrospective operation unless the language employed in the enactment is so clear it will admit of no other construction. *Guard* v. *Rowan*, 2 Scam., 499; *Marsh* v. *Chestnut*, 14 Ill., 223; *Deininger* v. *McConnell* 41 *id.*, 227; *Russell and Allison Drainage District* v. *Benson*, 125 *id.*, 490."

*Gage* v *Stewart*, 127 Ill., 207.

*Bauer Grocer Co.* v. *Zelle*, 172 Ill., 414 (and cases cited).

*Rowan* v. *Runnels*, 5 How., 134.

*Douglas* v. *Pike Co.*, 101 U. S., 677.

*Shreveport* v. *Cole*, 129 U. S., 36.

This statute does not in terms mention contracts theretofore entered into.

If the right to regulate rates already fixed under the statute was not reserved under the police power (and we have elsewhere shown it was not, *Infra*, p. 107), then a subsequent statute cannot change such right.

*Chicago* v. *Sheldon*, 9 Wall., 50 (and authorities, *infra*, p. 90)

H.

*The legislature having authorized defendant in error to make the contract of June 7, 1882, such contract must stand unless attacked for fraud.*

There is no allegation that fraud was used in the passage of this ordinance. There is no pretense that the contract was not entered into in the utmost good faith. There is nothing on which to found the belief that defendant in error was not as fully capable as plaintiff in error in ascertaining the reasonableness or unreasonableness of the rates which were established by the ordinance of June 6, 1882. There is no allegation in the pleas that plaintiff in error knew when it accepted such ordinance that the rates were unreasonable. Under well established rules of pleading, it is presumed that plaintiff in error did not know that such rates were unreasonable.

The fact that the parties acted under such contract for full fourteen years after it was made, and for five years after the act of 1891, authorizing the reduction of water rates, is pretty good evidence of its fairness.

There was no compulsion in entering into the contract. Defendant in error entered into the contract knowingly, and as such should be bound by its terms.

The legislature having authorized defendant in error to contract with Shelton, and it having so contracted, the courts are bound by such action unless such contract is attacked for fraud, which is not the case here.

Tiedeman on Mun. Corp., § 175.

Cooley on Con. Lim., **186–7.

15 Amer. & Eng. Ency. Law, 1046.

*New Orleans Water Works* v. *New Orleans*, 164 U. S., 481.

*Little Falls Electric Light Co.* v. *City of Little Falls*, 102 Fed. Rep., 663.

*Sherlock* v. *Village of Winnetka*, 59 Ill., 389.

*Dunham* v. *Village of Hyde Park*, 75 Ill., 371.

*Brush* v. *City of Carbondale*, 78 Ill., 74.

*Warren* v. *City of Chicago*, 118 Ill,, 329.

*City of Newport* v. *Newport Light Co.*, 84 Ky., 108.

*City of Memphis* v. *Memphis Water Co.*, 5 Heisk., 529.

In *Godson* v. *Winchester, etc.*, 12 Bush., 114, the court say that where a

"Grantee becomes bound by an express or implied undertaking to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be, for the legislature being vested with power to make grants of that character, when the public convenience demands it, the legislative judgment is conclusive, both as to necessity for making the grant, the amount of service to be rendered, and the courts have no power to interfere, however, inadequate the consideration or unreasonable the grant may appear to them."

Speaking of a somewhat similar ordinance, the court, in *VonReipen* v. *Jersey City*, 58 N. J. Law, 262, say:

"In absence of fraud or palpable abuse of discretion on part of municipal authorities, the only question for judicial cognizance is, whether there has been any violation of legal principles in entering into the engagement."

There is neither charge of fraud on part of plaintiff in error in entering onto this contract nor palpable abuse of discretion on part of the defendant in error, and the ordinance should stand.

I.

It will be argued here, undoubtedly, as below, that the ordinance of June 6th, 1882, granting an exclusive privilege, is a monopoly, therefore plaintiff in error is not entitled to the protection of this court.

It has frequently been held that a contract or ordinance granting the exclusive right to furnish gas or water is not unconstitutional, and is not a monopoly.

*New Orleans Gas Light Co.* v. *Louisiana Light Co.*, 115 U. S., 650.

*St. Tammany, etc.*, v. *N. O. Water Works*, 120 U. S., 64.

*Memphis* v. *Water Co.*, 5 Heisk, 529.

*B. & L. P. F. Co*, v. *Hawkey*, 31 Md., 339.

*Des Moines, etc. Co.* v. *Des Moines, etc., Co.*, 73 Ia., 573.

*Indianapolis Cable St. Ry. Co.* v. *Citizens' Street Ry. Co.*, 127 Ind., 369.

*Bartholomew* v. *City of Austin*, 29 Cir. Ct. App., 568, and cases already cited.

Unless limited by its constitution, the legislature may grant an exclusive license.

*New Orleans Gas Co.* v. *New Orleans Light Co.*, 115 U. S., 650.

*St. Tammany, etc.*, v. *New Orleans Water Works*, 120 U. S., 64.

Even if the ordinance of June 6th, 1882, were invalid, to the extent of granting an exclusive license, such fact did not render the remainder of the ordinance invalid, and the remainder of the ordinance will stand.

*Corcoran* v. *Lehigh & Franklin Coal Co.*, 138 Ill., 390.

*Bank of Hamilton* v. *Dudley*, 2 Pet., 492.

*Keokuk Packet Co.* v. *Keokuk*, 95 U. S., 80.

*Florida Cent. R. R.* v. *Schutte*, 103 U. S., 118.

*Town of Unity* v. *Burrage*, 103 U. S., 447.

*Vial* v. *Penniman*, 103 U. S., 714.

*Hills* v. *National Albany Exchange Bank*, 105 U. S., 319.

*Evansville Nat. Bank* v. *Britton*, 105 U. S., 322.

*Presser* v. *Illinois*, 116 U. S., 252.

*Baldwin* v. *Franks*, 120 U. S., 678.

*Little Rock, etc. R. R.* v. *Worthin*, 120 U. S., 97.

*Field* v. *Clark*, 143 U. S., 649.

*Reagan* v. *Farmers L. & T. Co.*, 154 U. S., 362.

*Pearsall* v. *Great Nor. R. R. Co.*, 161 U. S., 647.

Even if the ordinance of June 6, 1882, was invalid to the extent of granting an exclusive license, still, defendant in error having enjoyed and received the uses and benefits derived from the water furnished it, is liable therefore under a *quantum meruit*.

See authorities, *supra* p. 37.

Such question, therefore, does not arise, and should not enter into consideration in determining this case.

J.

In so far as the case of the *City of Danville* v. *Danville Water Works*, 178 Ill., 299 (and on the strength of which the present case was decided in the court below), holds to the contrary, it is opposed to the great weight of authority.

A careful examination of the Danville case, will further show that it is not founded on good reasoning.

On June 6, 1891, the legislature of the State of Illinois passed an act, providing:

"That the corporate authorities of any city, town or village, now or hereafter incorporated under any general or special law of this state, in which any individual, company or corporation has been, or hereafter may be, authorized by such city, town or village to supply water to such city, town or village, and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, and such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the Circuit Court of the county in which such city, town or village may be."

In the Danville case, the court relied largely upon the reasoning in the case of the *City of Carlyle* v. *Carlyle Water, Light & Power Co.*, 52 Ill. App., 577. That suit was for money due for rentals of hydrants under an ordinance which had been passed in September, 1887. In May, 1888, the city passed another ordinance which was not accepted by the Water Works Company. No water had in fact been furnished the city under the ordinance of 1888. This latter ordinance was passed three years prior to the passage of the act of 1891. The only question in that case, therefore, was whether or not a city was liable for water furnished and used by the city. That

a city is liable in assumpsit for water furnished at its own request, and is used by it, is well established.

The rights of the plaintiff in the *Carlyle* case accrued prior to the passage of the act of 1891; the construction of that act could not by any possibility come before the court, and its remarks found in that opinion relative to that act are mere *obiter dicta.*

In the *Carlyle* case, the court also based its decision upon the doctrine that municipalities could not, by contract, bind their successors, and rely upon the two cases of *East St. Louis* v. *East St. Louis Gas Light and Coke Co.*, 98 Ill., 415, and *Milliken* v. *County of Edgar*, 142 Ill., 528.

In the case of *East St. Louis Gas Light and Coke Co.* v. *City of East St. Louis*, the gas company was authorized by charter to make a contract for thirty years, but the charter of the City of East St. Louis, however, gave it no *express* authority to make what are called long-time contracts. It was, therefore, held that the city could not, by contract, under its implied powers, bind its successors.

In *Milliken* v. *County of Edgar*, there being no express authority in the county board of supervisors to make a contract for a longer time than one year, it was held that they could not, under their *implied* power, make a contract to employ a keeper of the poor-house for a term of three years or beyond the term of their office.

All that was decided in the *East St. Louis* or the *Milliken* case was that neither a city council or county board could, under their implied powers, make a contract which would be binding on their successors.

The Appellate Court, in the *Carlyle* case, entirely overlooked and ignored the distinction between *express* and *implied* powers. The doctrine of repudiation stated in the *East St.*

*Louis* and *Milliken* cases is based on the want of authority arising under the *implied* powers of a municipal corporation. The court does not attempt to discuss or say what the effect would have been if the municipal body had been granted *express* power by the legislature.

(2) We discuss and show later that the provisions of section 9 of the incorpoartion act do not affect the case at bar. (*Infra*, p. p. 93.)

(3) The court, in the Danville case, in addition to the foregoing cases, relied upon the cases of *Gale* v. *Kalamazoo*, 23 Mich., 354; *Des Moines* v. *Des Moines Water Works*, 95 Ia., 357; and *Spring Valley Water Works* v. *Schlottler*, 110 U. S., 347.

In the *Gale* case, an ordinance was passed giving the plaintiff the right to erect a market, to confine the marketing of the citizens, during the market hours, to the building and its vicinity, to appoint a proper officer for the enforcement of all by-laws and ordinances relative to the market and to the vending of market articles, and *to control the rents of the stalls for the benefit of the plaintiff*. The court, COOLEY, J., there say:

"The contract in question, however, is not only entered into in pursuance of an exercise of legislative authority on the part of the village, but it undertakes to control that authority in several important particulars.

It requires the appointment of a competent manager or clerk to attend to or supervise the market house and to require the observance of the ordinances and bi-laws relative to the marketing within the village. *For this purpose legislative action would have been essential*, and must, consequently, have been within the contenplation of the parties when the contract was made."

As was stated by BIDDLE, J., in the case of *City of Indianapolis* v. *Indianapolis Gas Light & Coke Co.*, 66 Ind., 396, at page 405, when commenting on the Gale case:

"It is apparant, in this contract, that the Village of Kalamazoo parted with its legislative and administrative power over the market house in several essential respects. In the language of COOLEY, J., 'Not only was the marketing to be confined to one locality, but the *plaintiff was to have an unlimited right to control the occupation of the market-prices through the power given him to determine the rents to be paid by the lessees*' This vested in him a practical monopoly of the public market. The vice of this contract lay, not in the agreement to have a market house built, but in the fact that the public authorities had undertaken to part with their control over it, when built. and place its management in the power of private speculation. This they could not do."

An entirely different rule and principle prevails where, as at bar, *the city itself*, in its legislative capacity, *determined the water rates* by ordinance and not leaving such rate to be determined by the capriciousness of the grantee.

An examination of the *Des Moines case* will show that the contract was made in 1871 for the erection of the water works. The city passed an ordinance amending the water rates in the year 1883. This amended ordinance was, in fact, *accepted by the water company* and acted upon by *both parties* until the year 1893. A dispute then arose between the city and the water company in reference to the construction of that part of the ordinance of 1883, providing *as to the manner of ascertaining* the water rates by *arbitration* in the case of disagreement. The point decided in that case was as to the construction of the terms of the ordinance of 1883. That is, whether the ordinance of 1893 was passed in accordance with the principles of that ordinance of 1883.

In the *Spring Valley Water Works* case the constitution of California, adopted in 1849, *prohibited one legislature from bartering away the power of successive legislatures to control the administration of private corporations* from under the laws of the state, and the statutes expressly provided that the water

rates to be charged should be "reasonable," and be determined, in case of differences, by arbitration. The Spring Valley Works had notice of this constitutional requirement when it accepted the privileges under the act of 1858, under which it was organized. A different question from the case at bar, where there is no inhibition in the constitution of the State of Illinois to prevent the legislature from passing any statute it thought best. In neither the *Gale*, *Des Moines* or *Spring Valley* case did the question of the *power* of the city arise in a case where it is expressly authorized by statute, as here, to make a contract for water for a definite time.

In the case of *The State* v. *Columbia Gas Light Co.*, 34 Ohio, State, 572 (also referred to in opinion in the Danville case), the charter was silent as to the price at which the gas was to be sold. The court held that under the *implied* powers there was no evidence of intention of the state to surrender its right to control such price.

The court, in *Zanesville* v. *Gas Light Co.*, 47 Ohio State, 1 (also referred to in said opinion), simply followed the *Columbus* case.

(4) The other authorities referred to in the Danville case (on page 312, 178 Ill.)—Greenhood on Public Policy, p. 317; Cooley's Constitutional Limitations, p. 206; 15th Amer. & Eng. Ency. Law, p. 1045, and Dillon on Municipal Corporations, p. 443—relate to powers arising under *implied* powers and not under express powers. They are not authorities upon the question arising under a power expressly authorizing the city to provide for a supply and fix the price of water by ordinance as in the case at bar.

(4) The better reasoning in the Danville case is contained in the opinion of Mr. Justice Phillips, who, with two other of the judges, dissented. (178 Ill., p. 316.)

## II.

### A.

*The ordinance of February 10, 1896, is in violation of the provisions of section 10 article 1, Constitution of the United States.*

(1) Nathan Shelton acquired all the rights and benefits under said ordinance, one of which, to-wit, the rates as "established by ordinance," were to continue as to him and his assigns for the full term of thirty years. The legislature of the State of Illinois, nearly nine years after the completion and erection of said system of water works, passed the act of June 6, 1891. Acting under and pursuant to such statute, defendant in error on the 10th day of February, A. D. 1896, passed an ordinance whereby it was provided that the annual rental to be paid for fire hydrants then in use by defendant in error, or which might thereafter be ordered as provided in said ordinance, should be at the rate of $50 per hydrant (Rec. 19, Sec. 2) instead of $100 for the first 100 and $80 for the next 50, and $50 for all over 150. (Rec. 9, Sec. 7.) In addition the ordinance (Rec., 10, Sec. 9; Rec. 20, Sec. 3 & 4) reduced the water rates to be charged to citizens from 10 to 60 per cent.

Such action of the common council of defendant in error, under the authority of the act of the legislature of 1891 has been repeatedly held to be the act of the state itself.

*New Orleans Water Co.*, v. *Louisana Sugar Ref. Co.*, 125 U. S., 18.

*New Orleans Water Co.*, v. *City of New Orleans*, 164 U. S,, 481.

*City Ry. Co.*, v. *Citizens St. Ry. Co.*, 166 U. S., 557.

(2.) Nathan Shelton, on August 8th, 1882, after he had accepted the obligations and provisions of the ordinance of June 6th, 1882, for a valuable consideration, transferred to plaintiff in error all his rights and interests under said contract, and in all rents, benefits and advantages to accrue therefrom, subject to all duties and obligations imposed in and by such ordinance.

The ordinance was passed upon the understanding that the rights acquired thereunder by Shelton might be assigned. In every place mentioned in the ordinance wherein the name Nathan Shelton is mentioned, is added thereto the words: "or his assigns." The defendant in error on December 18th, 1882 (and within the time fixed by the ordinance), accepted said system of water works from plaintiff in error as assignee of Shelton, as in and for full compliance with the terms thereof.

It is well settled that such ordinances are assignable, and the assignee is entitled to all the rights and benefits thereunder, and subject to all the duties and obligations thereof. Indeed this is not controverted.

2 Dillon Mun. Cor. 691.

*New Orleans Gas Light Co.*, v. *Louisiana Light & Heat Co.*, 115 U. S., 650.

*Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S., 558.

*Santa Ana Water Co.* v. *Town of San Buenaventura*, 56 F. R. 339.

*Little Falls Electric & Water Co.* v. *City of Little Falls*, 102 F. R., 663.

*State ex rel City of St. Louis* v *La Clede Gas L. Co.*, 102 Mo., 472.

In *re Pryor*, 55 Kas., 724.

(3.) Corporations are persons and within the provisions of the Federal Constitution, equally with individuals.

*Mo. Pac. Ry. Co.* v. *Macky*, 127 U. S., 210.

*Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S., 26.

*Charlotte* v. *Gibbs*, 142 U. S., 386.

*Smythe* v. *Ames*, 169 U. S., 522.

*Blake* v. *McClurg*, 172 U. S., 259.

(4.) The written acceptance of Nathan Shelton required by the ordinance was filed with the clerk of the City of Freeport on the 7th of June, 1882. Said ordinance, therefore, became and was binding as a contract between defendant in error and Shelton and his assigns, on the 7th day of June, 1882.

That defendant in error had power to execute such contract, we have already shown. If defendant in error had power to execute such contract, then it was not within the power of the legislature of the State of Illinois to pass an act imparing the obligation of such contract upon its acceptance, because it then became a vested right.

Even where an ordinance is repealed, such repeal cannot operate retrospectively to impair private rights vested under it.

Dillon on Mun. Cor., § 314.

Thompson on Cor., § 5413.

Tiedeman on Police Power, § 188.

Says Mr. Justice STRONG, in the Sinking Fund cases, 99 U. S., page 700:

"There is no technicality about vested rights. Most of them grow out of contracts, and no matter how they arise, they are all equally sacred; equally beyond the reach of legislative interference. A vested right of action is property in the same sense in which rights to tangible things are and equally pro-

tected. Whether it springs from contract or from other rules of the common law, it is not competent for the legislature to take it away."

In *Pacific Mail Steamship* v. *Joleffe*, 2 Wall., 450, Mr. Justice FIELD says:

"When a right has arisen upon a contract or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of a statute does not affect it, or an action for its enforcement. *It has become a vested right, which stands independent of the statute.*"

Where the right of repealing, amending or revoking is reserved, the state may exercise such reserved power, but, as was said by Mr. Justice FIELD, in *Tomlinson* v. *Jessup*, 15 Wall., 454.

"Rights acquired by third parties, and which have become vested under the charter in the legitimate exercise of its powers stand upon a different footing."

In *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S., 673, Mr. Justice BROWN says:

"A vested right is defined by Fearne, in his work upon Contingent Remainders, as 'an immediate fixed right of present or future enjoyment;' and by Chancellor Kent as 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent Com., 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction of being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.'"

In *Holyoke Water Power* v. *Lyman*, 15 Wall., 500, where the right to repeal, alter or revoke a charter was reserved, the court (Mr. Justice CLIFFORD), says:

"Vested rights, it is conceded, cannot be destroyed or impaired under such a reserve power."

And the right to repeal, alter or revoke is limited so that it

will not destroy or substantially impair the object of the grant, or any rights which have become vested under it.

The amendment must "not defeat or substantially impair the object of the grant, or any right under it."

*Close* v. *Glenwood Seminary*, 107 U. S., 466.

In *Douglas* v. *Kentucky*, 168 U. S., 488, in passing upon a repealing statute, Mr. Justice HARLAN, in delivering the opinion of the court, says approvingly:

"If rights have been acquired, or liabilities incurred, upon the faith of the privilege conferred by the grant, it would be obviously unjust to permit such rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant before the passage of the repealing law, then, to the extent of such rights at least, the law must be regarded as unconstitutional and inoperative."

In *Com.* v. *Essex Co.*, 13 Gray, 253, Chief Justice SHAW says:

"Where under power in a charter rights have been acquired and become vested, no amendment or alteration can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

The right reserved under the constitution as to impairment of contracts relates to contracts between states and individuals, or contracts executed under the authority of the state with individuals, equally as well as to contracts between individuals.

(5) "The obligation of a contract is the law which binds a party to perform his agreement."

*Walker* v. *Whitehead*, 16 Wall., 318.

"A contract between a state and an individual is as obligatory as any other contract."

*Piqua Bank* v. *Knoop*, 16 How., 369.

In *Van Hoffman* v. *Quincy*, 4 Wall., 535, the court says:

"Where a state has authorized a municipal corporation to contract * * * the power thus given cannot be withdrawn until the contract is satisfied. The state and corporation are equally bond."

(6) Says Mr. Chief Justice MARSHALL, in the case of *Fletcher* v. *Peck*, 6 Cranch, 87, where a grant was made of certain land by act of the legislature of Georgia, and in a suit for breach of contract by a grantee under a deed it was set up, among other things, that the legislature had repealed the act granting the lands to the vendor:

"The principle is, that one legislature is competent to repeal any act which a former legislature was competent to pass, and that one legislature cannot abridge the power of succeeding legislatures. The correctness of this principle, so far as affects the general legislature, can never be controverted.

If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made. Those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still, that they originally vested is a fact and cannot cease to be a fact. When, then, a law is in its nature a contract, a repeal of the law cannot divest those rights."

Speaking of the principle decided in *Fletcher* v. *Peck*, the court (Mr. Justice WASHINGTON) in *Greer* v. *Biddle*, 8 Wheaton, 86, says:

"The principles laid down in that case are that the Constitution of the United States embraces all contracts executed or executory, whether between individuals or between a state and individuals, and a state has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals."

Speaking of the provision of the Constitution as to impairing the obligation of contracts, Mr. Justice DANIELS says, in *West River Bridge Co.* v. *Dix*, 6 How, 523:

"The language and meaning of the inhibition were designed

to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and, therefore, inconsistent with and violative thereof."

In *The Trustees for Vincennes University* v. *State of Indiana*, 14 How., 277, where the trustees of the university acquired certain lands from the state, which the legislature subsequently sought to take away, the court say:

"The complainants, by accepting and exercising their corporate powers, acquired certain rights and made certain contracts which could not be impaired by the legislature."

In *Chicago* v. *Sheldon*, 9 Wall., 50, Mr. Justice NELSON says:

"A contract having been entered into between the parties, valid at the time by the law of the state, it is not competent even for its legislature to pass an act impairing this obligation, much less could any decision of its courts have that effect."

The principle is the same whether private or under a general law.

"Private charters, or such as are granted for the private benefit of the corporators are held to be contracts because they are based for their consideration upon the liabilities which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired, without the assent of the corporators than any other grant of property or legal estate unless the right to do so is reserved in the act of incorporation or in some general law of the state which was in operation at the time the charter was granted."

*Pennsylvania College Case*, 13 Wall., 190.

In *New Jersey* v. *Yard*, 95 U. S., 104, the legislature required the written acceptance of its act within sixty days, or if not accepted, such ordinance was to become void. The court (Mr. Justice MILLER) there says:

"It does seem as if the legislative intention was to make a

contract in the same manner and on the same terms of equal obligation as other contracts are made, and not to pass a statute which it could repeal or amend the day after it was signed by the parties."

In *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S., 647, Mr. Justice BROWN, delivering the opinion of the court, after discussing the *Dartmouth College Case*, 4 Wheat., 518, says that

"Subsequent cases have settled the law that wherever property rights have been acquired by reason of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation."

And after reviewing many of the cases which have come before this court, says, at page 675:

"Nor do we undertake to say that the legislature may not, in the exercise of a wise forethought, and for the purpose of directing capital to enterprises of doubtful profit, authorize the granting of monopolies for a limited time irrevocable by subsequent legislature."

That case was decided upon a statute which, subsequent to its charter, but before acceptance thereof, changed a right as against public policy.

In *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 9, Mr. Justice BROWN says:

"This court has too often decided, for the rule to be now questioned that the grant of a right of way to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650, 660; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S., 674; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S., 64; *Crescent City*

*Gas Light Co.* v. *New Orleans Gas Light Co.*, 27 La Ann., 138, 147."

In *Los Angeles* v. *Los Angeles City Water Co.*, 177 U. S., 558, the court, Mr. Justice McKenna, delivering the opinion, adopts the language of the Supreme Court of California in the case when before that court (61 Calif., 65), and says:

"The City of Los Angeles, by its solemn contract, and for various considerations therein stated, gave to the party under whom defendant claims, the privilege of introducing, distributing and selling water to the inhabitants of that city, on certain terms and conditions which defendant has complied with, and *it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to exercise the rights and privileges granted.*"

See, also,

*The Dartmouth College Case*, 4 Wheat., 518.

Says the court in the recent case of *Los Angeles City Water Co.* v. *City of Los Angeles*, 103 F. R., at page 734:

"It is a self-evident proposition that it takes at least two parties to make a contract, and it is equally plain that, as long as it exists at all, all parties are bound by its provisions. The fact that one of them is a municipal corporation in no manner alters the case. In *Meyer* v. *Brown*, 65 Cal., 589, the court said: 'It is well, occasionally, to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other.'"

In *Winter* v. *Jones*, 10 Ga., 190, when construing the effect of a subsequent act of the legislature, the court say:

"All commentators and all the adjudicated cases upon constitutional law agree upon these undisputed propositions, that the objection to a law on the ground of its impairing the obligation of a contract, does not depend upon the extent of the change which the law may make in it.

That any deviation from its terms *which may impose conditions not expressed in the contract, however minute and ap-*

*parently immaterial in their effect* is within its constitutional limitation.

That a constitutional act of the legislature which is equivalent to a contract when performed, is a contract executed, and whatever rights are thereby created a subsequent legislature cannot impair" (citing *Fletcher* v. *Peck*, 6 Cranch, 87, and numerous other cases in this court.

In *Crosby* v. *City Council of Montgomery*, 108 Ala., 498, an agreement was entered into with the water company in 1885. In February, 1887, the legislature passed an act authorizing the city to regulate water rates. In 1889 the city passed an ordinance changing the rates.

The court, in discussing the effect of such ordinance, says:

"The city cannot by pretended exercise of its police power or power to regulate water rates prohibit a contracting party from the exercise of every right and claim provided for in his contract, and which the parties had the right to provide at the time, nor had the city authority by ordinance to change the terms of the contract without consent of the other party."

Indeed, it would be but a work of reiteration and useless task to cite and quote the numerous cases which have come before this and other courts involving that part of the Federal constitution inhibiting laws against the impairment of contracts. What apparent exceptions there may be arise by reason of some power reserved in the statute subject to which the rights of the grantee were acquired.

None of these exceptions apply to the case at bar.

B.

*The right to repeal or amend the contract of June 7, 1882, was not reserved by the state.*

(1) It will doubtless be contended here as below that because plaintiff in error was a corporation organized under the General Incorporation Act of the State of Illinois, and because section 9 of that act provides that

"The General Assembly shall at all times have power to prescribe such *regulations and provisions* as may be deemed advisable, which *regulations and provisions* shall be binding on any and all corporations formed under the provisions of this act"

(Starr & Curtis' Statutes, p. 1006.), that, therefore, when the legistature afterwards in 1891, passed the act authorizing municipal authorities to establish and revise new water rates, the rights and obligations of the contract which were in good faith acquired by plaintiff in error prior thereto became modified by reason of the ordinance of February 10, 1896.

Such contention is fallacious, for three reasons:

First.—Said section 9 of the corporation act refers solely and only to such *regulations* and *provisions* as may apply to corporations as a class, and not to specific acts which interfere with the internal or business management of such corporations.

This section of the statute does not reserve the right to amend, alter or repeal the charter of the corporations organized under such statute. The provisions are simply "to prescribe such regulations and provisions" as the General Assembly may, from time to time, deem advisable. The "regulations and provisions" in this statute were inserted, not for the purpose of amending, altering or repealing the charter of a corporation or revoking contracts that might be lawfully entered into by such corporation.

The legislature has frequently given its own construction of this provision as to "regulations and provisions" in frequently passing statute amending the general incorporation act.

We find regulations and provisions such as relating to the increase of capital stock; changing the name of the corporation; changing the object or purpose of the corporation; changing

the number of directors; consolidating with other corporations; manner of calling stockholders' meetings; manner in which corporations can be wound up or proceedings had or taken by creditors and others against the corporation or stockholders; (Hurd's Statutes, 1899, Chap. 32), requiring all corporations to make annual reports to the secretary of state; requiring such corporations to forward the secretary of state affidavits that such corporation is not connected with trusts; forbidding corporations to unite in or form a trust, etc., and, generally, all those classes of acts which control the relation existing between stockholders as individuals and the corporation as an entirety, and the relations between corporations and third persons—that is, the manner of carrying on their business or exercising the powers of a corporation, but it was not contemplated under the terms, "regulations and provisions" of that act to interfere with the internal business management of the corporation itself.

It will not be contended for a minute that under such regulations and provisions a statute could be enacted which would regulate the price of coal sold by a corporation or the price of pig iron manufactured by another corporation, or any of the articles of commerce or other commodity dealt in by corporations, which would affect a corporation and not in a like manner affect individuals. Water is a commodity which requires no greater or special protection of the legislature than coal, wheat or any other commodity. Under such "regulations and provisions" undoubtedly the legislature or the municipality acting as its agent would have the right to pass regulations and provisions preventing the furnishing of impure water, the hours within which such water could be used for sprinkling purposes on private lawns, etc., the delivery of water to private hydrants, cleaning sinks, etc., and all kindred acts which relate to the manner of the supply and character as well as use

of the water, and which are necessary for the regulation of the public use thereof, but not for the price.

As was said in *New Orleans Water Works Co.* v. *Rivers*, 115 U. S., 674:

"Notwithstanding the exclusive privileges granted to the plaintiff the power remains that the municipal government of New Orleans, acting under legislative authority, required such regulations as will secure to the public uninterrupted use of the streets, as well as to prevent the distribution of water unfit for use, and to provide for such a continuous supply in quantity as protection to property, public and private, may require."

And such right is expressly reserved in the statute of April 10, 1872.

But here the words "regulations and provisions," as contained in section 9, added nothing to the law governing the internal or business management of corporations, save only such as might become necessary as to the *manner* or character in which the business of such corporation should be carried on, but not for the purpose of amending, altering, repealing or revoking its charter or contracts entered into by reason thereof.

Second.—Suppose Shelton had not assigned his contract to plaintiff in error, or had assigned all his rights under such ordinance to a third person, instead of a corporation, and such third party had performed and carried out the terms of the contract, as it is admitted was done by plaintiff in error; or, suppose such assignment had been made by Shelton to a co-partnership composed of two, twenty or more individuals, and such individuals or co-partnership were now the owners of the rights and benefits, under such ordinance, as the assignees of Shelton.

Would it be contended, for a moment, that section 9 of the corporation act could effect either Shelton or any such person

or partnership, as the case might be? The statement of the proposition is its own answer.

If Shelton had not assigned voluntarily, and had continued to carry out and perform the covenants of his contract up until the time of the passage of the ordinance of February 10, 1896, and had then died, no question could arise that such contract would not have passed, by operation of law, to his legal representatives. Under such circumstances section 9 of the incorporation act would not apply. What is the difference whether the assignment was made by Shelton by his voluntary act or by operation of law, or made to an individual or set of individuals, or to a corporation impowered by law to act?

Third.—The statute was not intended to apply in one case and not in another under similar conditions.

If such were the effect of the statute, the law would not be uniform in its operation. Such act would be class legislation, and would be unconstitutional. It must be presumed that the legislature had no intention to pass class legislation. Under section 23 of article 4 of the constitution of Illinois of 1870, the legislature was forbidden to pass any special legislation.

1 Starr & Curtis Stat., 134.

And it has been frequently held in Illinois that laws which are not uniform in their application are not constitutional.

*Ry. Co.* v. *Jacksonville*, 67 Ill., 37.
*People* v. *Cooper*, 83 Ill., 585.
*Hawthorn* v. *People*, 109 Ill., 302.
*Eden* v. *People*, 161 Ill., 296.
*Lappman* v. *People*, 175 Ill., 101.

"Class legislation discriminating against some and favoring others is prohibited."

Mr. Justice FIELD in *Barber* v. *Connelly*, 113 U. S., 27.

This was recognized in the case of *Illinois Central R. R. Co.* v. *City of Bloomington*, 76 Ill., 447, where Justice WALKER says:

"If, then, such burdens cannot be imposed upon a natural person, why, or by what reasonable means, can it be required of an artificial person? When brought into existence, these bodies are created persons, so far as to become amenable to the same burthens in support of the government, by taxes and the like, as natural persons coming into and subject to the government. But they are only liable to the performance of such duties, to the same extent, on the same terms and conditions, as natural persons. The legislature can exact of them no greater or higher duties than it can of natural persons, unless the right is reserved in their charters, or by some law that enters into their charters. One of the fundamental principles upon which all good government is constructed and is administered, is equality of burthens and protection. Any other principle is unjust and oppressive."

This identical question was considered by this court in *San Diego Land Co.* v. *National City*, 174 U. S., 749, where Mr. Justice HARLAN says:

"If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States: and in so far as it is thus deprived, *while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.*"

In *Williams* v. *Mississippi*, 170 U. S., 225, Mr. Justice MCKENNA, delivering the opinion of the court, quotes approvingly from *Yick Wo* v. *Hopkins*, 118 U. S., 356, and says:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of as tried merely by the opportunities which their terms afford of unequal and unjust discrimination

in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. *Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.* This principle of interpretation has been sanctioned in *Henderson* v. *Mayor of New York*, 92 U. S., 259; *Chy Lung* v. *Freeman*, 92 U. S., 275; *Ex parte Virginia*, 100 U. S., 339; *Neal* v. *Delaware*, 103 U. S., 370; and *Soon Hing* v. *Crowley*, 113 U. S., 703."

Clearly, it was not intended by section 9 of the incorporation act to impose one burden upon corporations supplying water to cities and another and different burden on individuals supplying water under similar circumstances.

(2) That the act of 1891 was not intended in any wise to affect or modify powers of corporations, is shown by the title of the act.

Under section 13 of article 4. of the Constitution, it is provided,

"No act hereinafter passed shall embrace more than one subject, and that shall be expressed in the title. * * * And no law shall be revived or amended by reference to its title only,"

Starr & Curtis Stat., 125.

The act relating to corporations is entitled "An Act concerning Corporations", and all amendments to such act, or affecting corporations, refer directly to corporations. (Starr & Curtis Stat., 988–1063). The title of the act of 1891 is "An Act to enable cities, towns and villages incorporated under any general or special law of this state, to fix the rates and charges for the supply of water furnished by any individual, company or corporation, to any city, town or village. and the inhabitants thereof." (Laws 1891, p. 85). No reference is made to any statute in such enactment, to the corporation act or any amendment thereto, and it was not intended to affect powers or duties of a corporation. It was intended to apply to corporations to the same extent as individuals, and no further, and was not intended to apply to corporations because of the simple fact that such company was organized under the general corporation act when it would not, under the same circumstances, apply to an individual. The act, in fact, which authorizes cities to regulate water rates has no more connection with the act relating to corporations, and the amendments thereto, than has the general appropriation act which was passed at the same session of the legislature.

(3.) There is nothing in the constitution or statutes of the State of Illinois by which power to alter, amend, revoke or repeal is reserved to the legislature of the State of Illinois.

It is well known that such provisions are now inserted in the constitutions and statutes of many states, and that these provisions arose by reason of the remark of Mr. Justice STORY, in the Dartmouth case, that, to overcome the effect of the doctrine announced in that case, such reservations should be inserted in the charter.

Says Mr. Justice MILLER, in *Greenwood* v. *Union Freigh R. R. Co.*, 105 U. S., at page 13:

"It was, no doubt, with a view to suggest a method by

which the state legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice STORY in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales* v. *Stetson*, 2 Mass., 146.

It would seem that the states were not slow to avail themselves of this suggestion."

In Morowitz on Cor. §1108, it is said:

"A reservation of power to repeal, alter or amend the charter is usually expressed in the most explicit terms."

Had there been a provision, either in the constitution of the State of Illinois, or in the statute relating to corporations, whereby the state reserved to itself the right to revoke, alter or amend the charter granted to plaintiff in error, then there might possibly be some ground for the contention that in accepting the contract between Shelton and defendant in error, the plaintiff in error took such contract, with the reserved power on the part of the legislature to amend, alter, revoke or repeal the whole or any part of the power to be exercised by plaintiff in error as a corporation organized under the laws of the State of Illinois, but it did not do so.

But even then it could pass no act which would abrogate contract rights lawfully entered into under existing laws.

The principle is the same whether such question arises under a private charter or public law.

"Private charters are such as are granted for the private benefit of the corporators, are held to be contracts because they are based for their consideration upon the liabilities which the corporators assume by accepting the terms therein specified, and the grant of the franchise can no more be resumed by the

legislature, or its benefits diminished or impaired without the assent of the corporators than any other grant of property or legal estate unless the right to do so is reserved in the act of Incorporation, or in some general law of the state which was in operation at the time the charter was granted." *Pennsylvania College Cases*, 13 Wall, 190.

"But where the legislature steps in and provides a maximum of charges, *it operates upon this corporation the same that it does upon individuals engaged in a similar business.* It was within the power of the company to call upon the legislature to fix permanently this limit and make it a part of the charter, and if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference; but it was not, and the company invested its capital relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation."

*Chicago B. & Q. Railroad Co.* v. *Iowa*, 94 U. S., 155.

In *Currran* v *State of Arkansas*, 15 How., 304, Mr. Justice CURTIS held that the state in revoking a charter of the bank could not impair or destroy the obligations or contracts of the bank.

In the case of *Close* v. *Glenwood Cemetery*, 107 U. S., 466, Mr. Justice GRAY, delivering the opinion of the court, when speaking of the Holyoke Dam case, says:

"The legislature, under the provisions reserved to amend, alter or repeal a charter, may ~~revoke~~ make any alteration or amendment 'which will not defeat or substantially impair the object of the grant, or any rights vested under it.'"

In *Georgia R. R.* v. *Smith*, 128 U. S., 174, Mr. Justice FIELD, delivering the opinion of the Court, says, when construing a charter of a railroad:

"It is conceded that a railroad corporation is a private corporation, though its uses are public and that a contract em-

bodied in terms in its provisions or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject to its own control up to the limit designated, *exemption from legislative interference within that limit will be maintained.*"

The court had this doctrine in mind in the late case of *Lake Shore*, etc., *Ry.* v. *Smith*, 173U S., 684, where the legislature of Michigan, under its reserved police power, passed a statute compeiling the railroad company to issue mileage tickets at the rate of 2 cents per mile, and where Mr. Justice PECKHAM says:

"*If unhampeved by contract*, there is no doubt of the power of the state to provide for maximum rates of charges for railroad companies. * * * Assuming that the state is not controlled by contract between itself and the railroad company, the question is how far the authority of the legislature extends in the case where it has the power of regulation? And also the right to amend, alter or repeal the charter af a company, together with a general power to legislate upon the subject of rates and charges of all carriers? It has no right, even under such circumstances, to take away or destroy the property or annul the contract of a railroad company with third persons."

In *Citizens' Water Company* v. *Bridgeport*, 55 Conn., 1, it was provided in the 16th section of the charter of the Bridgeport Water Company that this act shall be subject to be altered, amended and repealed at the pleasure of the General Assembly. The 17th section is as follows:

"If said company shall fail to comply with and in all respects to perform the terms and conditions, provisions and stipulations contained in the proposition * * * relative to providing said city with water * * * then all the rights, powers and privileges conferred by this act shall cease and determine. * * *"

The court say:

"The legislature having in effect authorized the city to make a contract which it desired to make cannot now relieve it, al-

though the state is no party to and has no interest in the subject-matter of the contract. If it volunteers to invest a creature of its own, otherwise powerless, with power to make it, the legislature is therefore afterwards concluded with reference to it, and it is as lawful a contract as between two natural persons of full legal capacity and secure from interference other than judicial construction."

The right to repeal will not defeat any rights acquired by contract under a statute valid at the time the contract is made.

*Commonwealth* v. *Holyoke Water Power Co.*, 104 Mass., 446.

*Sage* v. *Dillard*, 15 B. Monroe, 341.

*The Sinking Fund Cases*, 99 U. S., 700.

(4) It is a significant fact' that in all the states of the Union excepting Florida, Indiana and Louisana, we now find some provisions relative to the repeal, alter or revision, reserved either in the constitution (1) or in the general statutes (2) relating to corporations. * In Illinois, Colorado, Iowa, Mary-

*We find the following words are incorporated in or used in the constitutions (1) or statutes (2) of the various states:

"Alter, Amend, or Repeal": (1) Alabama, Arkansas, California, Colorado; (2) Maine, Missouri. "Amended, Reviewed or Revive": (1) Delaware. "Amended, Altered or Repealed": (1) Michigan, Oregon, Utah, Washington, Wyoming; (2) Vermont, Virginia. "Alter, Reform or Amend": 2) Texas. "Alteration, Amendment, and (or) Repeal": (2) Connecticut, Massachusetts, Michigan, South Carolina. "Alter, Revise or Amend": (1) South Dakota. "Alter, Revoke or Annul": (1) Pennsylvania. "Limit, Restrict or Annul": (2) Wisconsin. "Alteration, Suspension or (and) Repeal": (2) Montana, New Jersey, New York, North Dakota, South Dakota. "Alter, Amend, Repeal, Modify or Annul": (2) New Hampshire. "Revoke or Annul": (2) Pennsylvania. "Repeal or Amend": (2) Tennessee. "Repeal or Amendment": (1) Mississippi. "Altered or Amended": (2) Minnesota. "Amended or Repealed": (1) Kansas; (2) Delaware, Rhode Island. "Altered or Repealed": (1) Maryland, Nebraska, Nevada, New York, North Carolina, Ohio, Tennessee, Wisconsin. "Repeal or Alteration": (1) Idaho, Montana, New Jersey, North Dakota, South Carolina. "Amend or Repeal": (1) Iowa; (2) California, Idaho. "Repeal": (2) Kentucky. "Rescind": (2) Arkansas. "Withdraw": (2) Georgia. "Revocable": (1) Georgia. "Alter, Charter or Alter or Repeal Any Laws": (2) West Virginia. "Subject to General Laws of the State": (1) Maine. "Alter, Amend or Repeal and Prescribe Regulations and Provisions": (2) Colorado. "Legislative Control, Altered, Abridged or Set Aside, Regulated, Withheld, or Subject to Conditions": (2) Iowa. "Shall Be Subject to All Provisions and Regulations by reason of Any Amendments of the Laws of the State": (2) Maryland.

land only do we find the words "regulations and provisions" or either of them, used.

In section 1, article 11 of the constitution of 1870, of Illinois, it is provided.

"No corporation shall be created by special laws, or its charter extended, changed or amended, * * * but the General Assembly shall provide by general laws for the organization of all corporations hereafter to be created."

Starr & Curtis' Stat., p. 193.

The authority to change or amend the statutes of Illinois relating to corporations must then be found in the general law relating to corporations. No provision is contained for changing or amending the statute is found. The only provision in the statute is said section 9. Having in view the object for which such provisions are inserted in the constitutions or statutes of various states relating to corporations, we find used the following words:

Alter, alteration, altering, amend, amendment, amended, abridge, annul, control, subject to conditions, limit, modify rescind; reform, repeal, repealed, restrict, review, revoke, revocable, revoked, suspended, suspension, withdraw.

The maxim of *expressio unius exclusio alterius* applies to construction of the statutes and constitutions the same as contracts.

In using the words "regulations and provisions" in section 9 of the incorporation act instead of the words used in the constitution must have intended to limit the powers simply to such acts as we have indicated. (*Supra*, p. 94.)

(5) Wherever this question has come before this court, the intention to modify the charter has been clearly expressed.

A few cases will suffice to illustrate our point.

In the Pennsylvania College case, 13 Wall., 90, we find the words, "alter or modify," used in the statute.

In the case of *Miller* v. *New York*, 15 Wall., 478, we find the words, "alteration, suspension or repeal."

In *Holyoke Water Power* v. *Lyman*, 15 Wall., 500, "amended, altered or repealed."

In *Shields* v. *Ohio*, 95 U. S., 319, the words "altered, revoked or repealed."

In *Greenwood* v. *Freight Co.*, 105 U. S., 13, the statute provided that every act relating to organization of a corporation "should be subject to amendment, alteration or repeal."

In another case, however, that of *Beer Co.* v. *Massachusetts*, 97 U. S., 25, the statute contained a provision that the legislature might "from time to time make further *provisions* and *regulations* for the management of corporations * * * or wholly to repeal any act or part" thereof establishing any corporation.

The use of the words "provisions and regulations" in section 9 could not have the effect of an amendment or alteration, substitution, revoking or repealing the statute relating to corporations. Had such been the intention, it would have been made plain. That our contention is correct is shown in *Beer Co.* v. *Massachusetts*, where this court recognized the fact that providing for "regulations and provisions" was for the management of the corporation, and that it was not the intention of the legislature when passing the act of 1891 even to regulate the manner or character of carrying on the business of the corporation so as to interfere with its internal operation.

The right to make regulations and provisions does not give the power to repeal. If it was the intention of the legislature by the Act of 1891 to alter or amend the charter of the corporation, it would have expressed such intent in explicit terms.

(6) There is nothing, in either the *Spring Valley Water Works* v. *Schlotter*, 110 U. S., 347, or *San Diego Light Co.* v.

29184



*National City*, 174 U. S., 739, cases, which conflicts with the doctrine contended for by us. They are not parrallel cases.

The constitution of California expressly provides that:

"The use of all water is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law."

That the rates should be established annually by ordinance on or before February 10th in each year, such ordinance to take effect on July 1st thereafter, "and shall continue in force for one year, and no longer."

In these cases, the company was organized after the constitution went into effect. The company had full notice of the provisions of the constitution, and, as the court say:

"Took its rights subject to this provision."

In the case at bar, the plaintiff in error did not take the contract with a limitation on the part of any person as to the extent of the price, but Shelton took the contract upon the authority of the legislature, that the water rates should be fixed.

C.

*The ordinance of February 10, 1896 was not passed under what is called the reserved police power.*

The term "police power" has never been specifically defined.

Its application depends upon the circumstances of each case as it arises.

Be this power what it may, it cannot be used toward the impairment of a contract valid at the time of its execution.

"All-embracing and penetrating as the police power of the state is, and of necessity must be, it is, nevertheless, subject, like all other legislative powers, to the paramount authority of the state and Federal constitutions. A right conferred or pro-

tected by the constitution cannot be overthrown or impaired by any authority derived from the police power."

1 Dillon on Mun. Corp., § 142.

In speaking of the exercise of police power, COOLEY, in his work on Con. Lim., *p. 577, says:

"They (the legislature) must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact and not amendments of the charter in curtailment of the corporate franchise."

See also Morowitz on Corporations, §§ 1101-2, 1112.

It is true this court (Mr. Chief Justice FULLER) said in *N. Y. & N. E. R. R.* v. *Bristol*, 151 U. S., 567; that it is

"Established in this court that the inhibitions of the Constitution of the United States upon the impairment of contracts or the deprivation of property without due process of law or of the equal protection of the laws by the states are not violated by the legislative exercise of legitimate power in securing the public safety, health and morals."

Yet in the same case, the court say it is equally well established (quoting from *Close* v. *Glenwood Cemetary Co.*, 107 U. S., 466), that:

"A power reserved to the legislature to alter, amend or repeal a charter authorizies it to make any alteration or amendment of a charter granted, subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

Speaking of this (police) power, Mr. Justice PECHHAM, in *L. S. & M. S. Ry. Co.* v. *Smith*, 173 U. S., 689, says:

"This power must, however, be exercised in subordination to the powers of the Federal constitution. If in the assumed exercise of its police power, the legislature of a state directly and plainly violate a provision of the Constitution of the United States, such legislation would be void."

29185



Undoubtedly the case of *Munn* v. *People*, 94 U. S., 113, and kindred cases, will be cited and quoted from as sustaining the authority of the legislature to pass the act of 1891. We shall not now here attempt to criticise that case. We shall not here attempt to discuss the extent to which the doctrine announced in that case applies. We contend that that case is not in point.

In the case at bar, a right was granted to Shelton and his assigns under a power expressly given by the legislature to furnish water for defendant in error for the time limited by the statute, and by ordinance as therein provided.

Commencing with the case of *New Orleans Gas Light Co.* and *Louisiana Light, Etc. Co.*, 115 U. S., 650, this court has frequently held that contracts relating to gas or water similar to the one in question, and for a limited period were valid contracts.

In *New Orleans Gas Light Co.* v. *Louisiana Light, etc. Co.*, 115 U. S., 650, where the city grant an exclusive license to sell gas for fifty years, after reviewing many of the cases in this court which held that "one legislature cannot so limit the discretion of its successors that they may not exact such laws as are necessary to protect public health or public morals." Still, such doctrine was not applicable to such a license, and says:

"The present case involves no such considerations. We have seen, the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, so far from affecting the public injuriously, has

become one of the most important agencies of civilization for the promotion of the public convenience and the public safety.

It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, that work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable, either that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or that the public would have been deprived of the security in person, property and business which comes from well-lighted streets."

In *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S., p. 675, Mr. Justice BROWN says:

"Nor do we undertake to say that the legislature may not, in the exercise of a wise foresight and, for the purpose of directing capital to enterprises of doubtful profit, authorize the granting of monopolies for a limited time, irrevocable by subsequent legislation. To do so would practically ignore or overrule a series of cases to which we have already adverted, wherein corporations have been induced to furnish municipalities with bridges, gas, water and other requirements of modern civilization, by the promise of exclusive privileges for a term of years."

See, also,

*Railroad* v. *Maine*, 96 U. S., 511.

*The Sinking Fund Cases*, 99 U. S., 700.

*New Orleans Water Works* v. *Rivers*, 115 U. S., 674.

But this question is no longer an open one in this court.

In *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 9, Mr. Justice BROWN, rendering the opinion, said:

"The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health or morals of its inhabitants, but it is to cases of this class that these rulings have been confined.

If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the constitution is ineffectual." * * *

And after referring to prior decisions of this court, says:

"*But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.*"

Says Mr. Chief Justice WAITE in the Railroad Commission cases, 116 U. S., 347, when speaking of the object of the Railroad Commission act:

"The great purpose of the statute now under consideration is to fix a maximum of charges and to regulate in some manner of a *police nature* the use of railroads in the state."

This court having settled in the Walla Walla case that the right to regulate the price of water is not within the purview of the police power as laid down in *Munn* v. *People* and kindred cases. The doctrine of police power is not applicable as against the rights of plaintiff in error in this case.

## III.

*The effect of the Ordinance of February 10, 1896, is to take the property of plaintiff in error without due process of law, in violation of Section 10, Article XIV, of the amendments to the Constitution of the United States.*

### A.

The act of June 6, 1891, prescribes that in all cases the municipal authorities are

"Impowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation, to such city, town or village, and the inhabitants thereof, such rates and charges to be just and reasonable, and in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and *determined* by the Circuit Court in the county in which said city, town or village may be."

(1) We have not only shown that the ordinance of February 10, 1896, did impair the obligation of the contract entered into between Shelton and defendant in error, but such ordinance also took the property of plaintiff in error without just compensation and without due process of law.

In considering this question, we must not lose sight of the fact that in making this contract the municipality was not acting in its capacity of a sovereign, but in the capacity of a private (not public) corporation, the same as a private person.

Many circumstances and conditions enter into and should be considered in determining what are reasonable rates; such as the amount of money invested in the plant; the cost of operating the same and the net income to be derived therefrom; the character and the nature of the improvement; the probability of increased or decreased compensation; the facilities

or difficulties in obtaining a supply of pure and wholesome water, the length and character of water mains required to be supplied; the distance to which the outlaying mains have to be extended and carried; the distance from which such water supply must be brought and pumped; the supply to be maintained; the extent of the probable call to be made by the city for free water; the character and extent of the improvements of the city itself; their liability to exposure from fire from factory and other causes; the density of the population; these and innumerable other causes which naturally arise and suggest themselves should and must be taken into consideration in determining whether or not the rates established under the ordidinance of February 10, 1896, were reasonable.* None of these or any other circumstances are required by the statute to be considered by the city in establishing rates. No previous notice to the party furnishing water is required to be given under the statute. It is wholly an *ex parte* proceeding.

The legislature however (in acting by itself or commissioners) is an unbiased party, without any interest in the matter, and always affording an opportunity of the party whose property is to be affected to be and appear and be heard; in other words, an independent "body of men." Not so here, the establishment of water rates, in the first instance, is solely at the whim of the municipality.

In all cases it is the duty of the persons on whom is imposed the duty of determining rates to make so full and sufficient examination to pass upon the matter intelligently.

In *San Diego Light Co.* v. *National City*, 174 U. S., 751, in commenting upon a statute under which no notice was re-

*As illustrative; see the opinions of Mr. Justice Brewer in *Reagan* v. *Farmers L. & T. Co.*, 154 U. S., pp. 399 to 412, as to what circumstances should be considered in establing reasonable rates for railroad companies, and Mr. Justice Harlan, in *Smyth* v. *Ames*, 169 U. S., 492 to 550.

quired to be given to the party who was to be affected, Mr. Justice HARLAN says:

"It does not follow, however, that because no notice is necessary, the board are for that reason excused from applying to corporations or individuals interested to obtain all information necessary to enable it to act intelligently and fairly in fixing rates. This is its plain duty, and the failure to make proper effort to procure all necessary information, from whatever source, may defeat its action."

(2) Counsel will contend that under such act, even if the rates as established by ordinance of February 10, 1896, are unreasonable, plaintiff in error has his remedy in the Circuit Court.

Establishing rates is a *legislative*, and not a *judicial*, act.

The principle applicable to this case is the same as that in the establishment of railroad rates, which have so often come before the courts. In those cases, the rates are first established either by the legislature itself or by a commission—an independent tribunal *pro hac vice*, the state, in its legislative capacity, determining what are reasonable rates.

It has been found to be impracticable to regulate by an elaborate system of legislation the duties of railroad companies to the state or nation. All the minor matters to which the powers of the government could be properly extended, hence there have been created in most of the states railroad commissioners. These acts have been sustained as constitutional, but in each such case the commissioners are disinterested parties, and, as such, make an impartial and complete investigation before establishing rates. They are an impartial tribunal, who are either appointed by the Executive or elected under provisions adopted by the legislature to hear evidence and determine as a branch of the legislature what are reasonable rates.

In speaking of such commissions, in 2 Redfield on Railways, § 246, the author says:

"Such a board, if properly constituted, can scarcely fail to be of very essential service to the legislature of the several states whose sessions are short, and whose members are often inexperienced, both in the detail of general legislation requisite for the proper management of railroads, and especially with the devices sometimes resorted to for the purpose of gaining unequal and unjust special legislation on behalf of interested individuals or corporations, but the benefit of a board must depend chiefly upon its intelligence and *independence*. Without these, it might become an instrument of wrong and injustice, more effective perhaps than an ordinary legislative committee."

In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 394, Mr. Justice BREWER says:

"Such a commission is merely an administrative board, created by the state, for carrying into effect the will of the state as expressed by its legislature. R. R. Commission Cases, 116 U. S., 307."

In the various cases which have come before the courts involving this question, more numerously in railroad than in other cases, the legislature and courts recognize the fact that such commissions were acting as the representatives of the legislative department of the state, before whom railroads were authorized to appear, present data, and an opportunity afforded them to be heard, as to establishing or changing rates, and thus at the least an opportunity afforded them at law before their property rights were effected or destroyed.

The courts have uniformly held that the act of *establishing* and *determining* rates was a legislative act, and not a judicial act, and that, while they will grant relief against unjust and unreasonable rates, they will not *establish* or *determine* rates.

"It is insisted that the owner of property is entitled to a reasonable compensation for its use, even if it be clothed with a public interest, and what is reasonable is a judicial and not a legislative question. As has already been shown, *the practice has been otherwise.*"

*Munn* v. *People*, 94 U. S., 113.

"The legislature must decide rates. The court can only control."

*Dow* v. *Beidelman*, 125 U. S., 680.

Says Mr. Justice BREWER in *Chicago, etc., R. R. Co.* v. *Wellman*, 143 U. S., at page 344:

"The legislature has power to fix rates, and *the extent of judicial interference is protection against unreasonable rates. Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S., 307; *Chicago, Milwaukee, etc., R. R.* v. *Minnesota*, 134 U. S., 418."

This language was quoted and approved in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 398.

As was said by Mr. Justice BREWER in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U S. (at p. 397):

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet, it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, *nor the limits of judicial inquiry altered*, because the legislature, instead of the carrier, prescribes the rates. *The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission;* they do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carriers and the shippers; *they do not engage in any mere administrative work*; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

Says Mr. Justice BREWER, in *Inter State Commerce Commission* v. *R. R. Co.*, 167 U. S., p. 499 :

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act, but it is entirely different thing to prescribe rates which shall be charged in the future—*that is a legislative act.* *Chicago, Milwaukee, &c., Railway* v. *Minnesota*, 134 U. S., 418, 458; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., 362, 397; *St Louis & San Francisco Railway Co.* v. *Gill*, 156 U. S., 649, 663; *Cincinnati, New Orleans &c. Railway* v. *Interstate Commerce Commission*, 162 U. S., 184, 196; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S., 197, 216; *Munn* v. *Illinois*, 94 U. S., 113, 144; *Peik* v. *Chicago & North-Western Railway*, 94 U. S., 164, 178; Express cases, 117 U. S., 1, 29."

See, also,

*San Diego Land Co.* v. *National City*, 174 U. S., 750.

These cases show that the power to *determine* rates conferred upon Circuit Courts in the act of 1891, is a *legislative* act and one which the court has no power enforce.

(2) Article 3 of the constitution of 1870 of Illinois provides:

"The powers of the government of this state are divided into three distinct departments: the legislative, executive and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Starr & Curtis' Stat., p. 117.

This provision of the constitution has frequently come under the consideration of the courts, and it has been held that the judiciary has no power to infringe upon what are legislative acts.

*Field* v. *People*, 2 Scammon, 79.
*City of Galesburg* v. *Hawkinson*, 75 Ill., 152.
*Dodge* v. *Cole*, 97 Ill., 338.

As illustrative of this is the case of *City of Galesburg* v. *Hawkinson*, *supra*, where the legislature passed an act authorizing the voters of any territory to file a petition in the Circuit Court in certain cases, and authorizing the court either to exclude such territory from, or annex such territory to, villages and towns. The matter is so clearly stated in the opinion that we may be pardoned in quoting therefrom.

Mr. Justice SCHOLFIELD says:

"The boundaries of the city of Galesburg are defined by its charter and amendments thereto, and any change in those boundaries must necessarily contract or enlarge the sphere of its municipal jurisdiction, and, therefore, constitute, so far, an amendment of its charter. That the legislature may delegate authority to a municipal corporation to make changes in its boundaries does not affect the principle we claim to be applicable here, for in such cases the municipality acts through its legislative authority; nor is it necessary to inquire how far a law may, in its application to persons, or things, be made to depend on prescribed conditions. The attempt here is to invest the judiciary with power, not merely to determine whether certain prescribed conditions upon which the law is to take effect exist, but whether as to a certain locality there ought to be a change in the existing law on a particular subject, and if, in the opinion of the court, the change ought to be made and injustice will not be done thereby, it is empowered to make it. Wherein would the principle be different if the legislature had authorized the Circuit Court to receive the petition of a certain number of citizens of any incorporated city, town or village, to pay out and improve certain streets, or to prohibit domestic animals from running at large within the corporate limits, and hear evidence on the subject, and if it should find that the streets ought to be laid out and improved or domestic animals should be prohibited from running at large, and no injustice would be done thereby, to render a decree to that effect? We see none; and yet it is too patent to admit of illustration that this would be legislative and not a judicial determination. Whether cities, towns or villages should be incorporated, and, if incorporated, whether enlarged or contracted in their boundaries, presents no question of law or fact for judicial determination. It is purely a queston of

policy, to be detrmined by the legislative department. In the language of WOODBURY, J., in *Merrill* v. *Sherburne*, 1 N. H., 204, 'a marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is applied by the one, *and made by the other.* To do the first, therefore, to compare the claims of parties with the law of the land before established, is in its nature a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is, in its nature, a legislative act.'

It is of the essence of a judicial determination that it shall, so long as unreversed, and not vacated, be conclusive as to the matters involved in the controversy; but it must be admitted that the legislature might, after this decree was rendered, have revered the decision of the court by fixing, by statute, the boundaries of the city differently from those declared by the decree.

The proposition, to our minds, may be reduced within a very small compass. *The same power cannot be either legislative or judicial, as the legislature may incline to retain it, or surrender it to the judiciary.*"

The power given Circuit Courts is to "review *and* determine" what are reasonable rates.

Webster defines "determine" to mean "to regulate; to resolve; to settle; to *decide;* to ascertain definitely," etc. The Century Dictionary defines "determine" "to find out; to make out; to ascertain or state definitely; to *fix* or ascertain definitely," etc.

Thus was given to the Circuit Courts the power to *decide, regulate* and *fix* what are reasonable rates. That is a *legislative* act—not a *judicial* act.

"*The extent of judicial interference is protection against unreasonable rates.*"

*Chicago, etc., R. R.* v. *Wellman, supra.*

"*Courts* * * * *do not* DETERMINE * * * *what under all circumstances would be fair and reasonable.*"

They "are not authorized to revise or change the body of rates imposed by a legislature" (municipality *pro hac vice* the legislature).

*Reagan* v. *Farmers Loan & T. Co., supra.*

That is mere administrative work.

The power to determine whether one rate would be "fair and reasonable" must *ex necessitate* be *determined* by the legislature. It cannot be both a *legislative* and a *judicial* act. The legislature, as stated in *Galesburg* v. *Hawkinson*, cannot *surrender* such power to the judiciary. Under the provisions of the constitution these powers must be kept distinct.

The judiciary are not here given power to protect *against* an unjust or unreasonable abuse of the power of a municipality to establish rates which is the limit of the power of courts; but they are given full power to determine, *i. e.*, to resolve; to decide; to regulate and to fix definitely such rates. This duty the legislature have no authority to empower the judiciary to perform. The power given in the statute is to review *and* determine. not restrain an abuse; but the court as a *branch* of the legislature is to establish anew what it deems reasonable rates.

A court cannot, therefore, *determine* what are just or reasonable rates to be charged. If the court should attempt to establish, *i. e.* determine rates, it would be a usurpation of the legislative prerogative. It is not the duty of the court to establish rates, but to check legislative authority in the unjust use or abuse of that power.

(3) If defendant in error, in its private capacity, being a party to a civil contract, is given by the legislature the power to fix, pass upon what it should deem to be just or reasonable charges, *it is made to be a judge in its own case.*

2919



This the legislature cannot do, and has no power to authorize to be done.

In the case at bar, the spectacle presents itself of an obligee under a contract sitting in judgment in its own case—passing upon the question of what the obligee, in its own absolute discretion, deems to be a reasonable price to be paid on such contract, nor what should be determined as a reasonable sum by the legislature or by an impartial body of persons acting as commissioners, sitting in their stead, before whom plaintiff in error could appear, and to whom an opportunity of being heard in his own behalf would be afforded, if the rates established by the solemn contract of the parties were not reasonable. And if reasonable rates were to be established that should only be done upon full information and due examination and consideration of the numerous circumstances which enter into and form a basis upon which such body should act.

*Nemo debit esse judex in propria sua causa*, is a maxim of the common law.

Broom's Legal Maxims, 118.

Even the English Parliament, whose power and jurisdiction "is absolute and without control" (1 Black. Com., p. 161), and which Lord Coke says "Cannot be confined, either for cases or persons, within any bounds" (4 Inst., 36), is bound by this natural law.

"And, therefore, it is laid down that even an act of Parliament, made against natural equity as to make a person judge in his own case, is void in itself. For *jura naturæ sunt immutabilia*, and they are *leges legum*." Broom's Legal Maxims, *119

(Quoting from the opinion in *Day* v. *Savage*, Hob., 856).

This principle of law has come down to us from our British ancestors with the *Magna Charta* as part of the common law.

The common law of England prior to the fourth year of James the First has been adopted as the law of the State of Illinois.

(Starr & Curtis Stat., p. 901.)

This rule is not a local rule. It is of a general nature, and is as applicable to the affairs of to-day as when it was first recognized.

Speaking of natural law, Blackstone (1 Com., 41) says:

"This law of nature being co-evil with mankind, and declared by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries and at all times. *No human laws are of any validity if contrary to this.*"

This law of nature is part of the common law of Illinois. The constitution of the State of Illinois is subject to this natural law. It is not within the province of the legislature of the State of Illinois to abolish it.

In *Washington Ins. Co.* v. *Price*, Hopkins Ch., 1, it is said:

"It is a maxim of every code in every country, that no man should be judge of his own cause. The learned wisdom of united nations and the unlettered ideas of ruder societies are in full accordance upon this point. * * * Though the principle that a party can never act as judge is not declared by our constitution or statutes, yet it is a maxim of universal justice, and is undoubted law in England. It exists here, and it exists there—a rule of the common law. It is not left to the discretion of a judge or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation."

"No one ought to be a judge in his own cause, and so inflexible and so manifestly just is this rule that Lord Coke has laid it down that even an act of parliament made against natural equity as to make a man a judge in his own case is void in itself for *jura naturæ sunt immutabilia* and they are *leges legum.*"

Cooley Con. Lim (2nd Ed.), 412.

"To empower one party to a controversy to decide it for himself *is not within the legislative authority*, because it is not the establishment of any rule of action or decision."

Cooley on Con. Lim. (4th Ed.), 412.

Says the court in *Sanborn* v. *Fellows*, 22 N. H., 473, where one of the fence viewers was an uncle of one of the parties:

"We should not expect to find many cases where the question has arisen in relation to that class of officers usually called judges, because any attempt by such a person to act as a judge in a case in which he was personally interested, or in which any of his near relatives are interested would be so grossly indecent and improper that it would be at once condemned by public opinion."

The court held the entire proceedings *coram non judice*.

In *Dimes* v. *Grand Junction Canal*, 3 House of Lords Cases, 759, where the vice-chancellor who heard the case was a stockholder in a corporation party complainant to a suit, the decree was reversed.

Lord CAMPBELL said:

"No one can suppose that Lord Cottonham could be in the remotest degree influenced by the interest he had in the concern. But, My Lords, it is of the least importance that maxim that no man is to be a judge in his own case should be held sacred, and that is not confined to a case in which he is a party, but applies to a case in which he has an interest."

Although there are but few cases found in the books, be it said to their credit, where judges themselves were interested, still the principle has been extended and applied to all those cases where a party acting in a capacity which is liable to affect his own interest. The rule has been applied more extensively to parties in interest sitting as jurors.

But a case in which the principle contended for by us is clearly announced is the case of *State* v. *Crane*, 36 N. J. Law (7 Vroom), p. 394. Commissioners were appointed to authorize highways and assess damages. The land of one of

the commissioners was taken and for which he was allowed damages. The court held that although there was a majority of commissioners without the one interested, still "it was the duty of the court to set aside the whole proceedings," and this in spite of a statute which provided that whenever a majority of the commissioners of highways signing a report who were competent and disinterested, such report should not be considered illegal, and the court, after discussing and admitting that the interest as a taxpayer would not be sufficient to operate against the rule, the legislature having subsequently sought to legalize such action, say:

"But the interest of this commissioner was of a different character. It was peculiar and direct. In *Schroeder* v. *Ehlers*, 2 Vroom, 44, the present chief justice inclined to the opinion that the rule that a man cannot be a judge in his own case is so fundamental that the legislature cannot destroy it, and his references show the strong tendency of the English courts in the same direction, as respects an act of Parliament. Lord Coke declared, while sitting judicially, that 'even an act of Parliament, made against a natural equity, as to make a man a judge in his own case, is void in itself, for *jura naturæ sunt immutabilia*, and they are *leges legum*.' Hobart, 87a. In England the courts would naturally avoid any decision affecting the omnipotence of Parliament, and seek by possible construction to show an intent in every statute consistent with common right and natural justice. That latter would also be the duty of the courts here if it could be done as it was done in *Schroeder* v. *Ehlers*. But the question cannot now be disposed of in that way. It must be distinctly met. Judge Cooley, in his valuable book, says, that he does not see, apart from the exceptions given, 'how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people indeed, when framing their constitution may establish so great an anomaly, but if the legislature is entrusted with apportioning and providing for the exercise of the judicial power, we cannot understand them to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower

one party to a controversy to decide it for himself, is not within the legislative authority; because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.' Const. Lim., 412; see, also, in the same subject, *Ames* v. *Port Huron Co.*, 11 Mich., 139.

It seems to me that it cannot rationally be disputed that there exist certain legislative powers outside of written constitutions and fundamental to the due exercise of sovereignty, and also certain legislative restrictions for the protection of the property of the people, alike fundamental. An instance of power is that of the taking of private property for public use upon compensation, and it does not depend upon any constitution. It is an attribute of sovereignty. *Sinnickson* v. *Johnson*, 2 Harr., 145. An instance of restriction is, that private property cannot be taken for private use. The legislature cannot pass an act to take the land of one man and give it to another. That prohibition is not in the constitution, yet it lies deep in the fundamental nature of our government, which is intended, among other things, to secure the natural and inalienable rights of property. There are certain great principles of justice that the people have not parted with to their legislatures, and which cannot be violated without disregarding and defying the essential nature of our government and system of laws.

The maxim under consideration has always been regarded in English jurisprudence as elementary and fundamental in judicial action (Coke. Lyt., § 212, Broom 109), and, I think, can no more be materially invaded by the legislature than it could pass an act that a judge might decide according to lot, or for a party who should give him the most money. The Chief Justice, in *Schroeder* v. *Ehlers*, says, 'that a person cannot be a judge in his own case has ever been regarded as one of the fundamental maxims of the law of nature'; also, that the injustice of allowing it is intuitive in the human mind. In my judgment, the legislature is impotent to break down this great barrier to tyranny and fraud. The power of the legislature has been seriously questioned even in removing disabilities for a common interest, and the fair implication of the case is, considering the ground upon which it is sustained, the remoteness and smallness of the interest, that it does not reach beyond

interests of a general nature. (See cases referred to.) The maxim is inherent in and a part of the nature of judicial action, and although in many matters the legislature may provide for the exercise of judicial functions, and designate the persons who shall exercise them, yet it cannot, in so doing, lose sight of the essential character of judicial action, and authorize or sanction a judgment through instrumentalities contrary to the innate and universally recognized sense of natural justice. In such a case, the power conferred would not be judicial, it would be tyrannical.

The legislature could not have directly authorized these commissioners, if interested, to decide their own cases, and certainly a retrospective act of the same character ought not to be sustained. But the act in question seeks to cure the taint by expunging the objectionable commissioners from the board, and giving effect thereby to the action of the remaining three. In other words, the object is to separate the action of one commissioner from the others after the mischief, and to abridge the influence that his interest would otherwise have. That will not help it, for the law does not sever the action that is tainted. The whole is affected. It is an entirety. A majority of the board could have legally acted without Hammer, but he having taken part in the proceedings, the whole was voidable on proper application. *To sanction an act of the legislature, ratifying it in such a mode, would be indirectly crippling the natural force and effect of the maxim, and depriving the prosecutors of its reasonable protection.*"

In *Ames* v. *Port Huron Log Driving & Booming Co.*, 11 Mich., 139, the corporation was organized under the general law relating to management and control of logs floating in rivers. Under the statute, the defendants were authorized to remove all obstructions in the stream, caused by accumulation of logs, assume control of the logs, run them down, and deliver them to the respective booms where they belonged, at the expense of the owners of the logs, and were given lien on such logs for such amount as should be sufficient to satisfy all just and reasonable charges, proportionate to the amount of the expense attending such matter, with power to sell such logs

for such charges and expenses, upon statutory notice being given by advertisement, and to bid in such amount if the amount of such expenses were not paid for the amount thereof.

The court held that these proceedings were *ex parte*, and *in invitim*, and say:

"It is an inflexible principle of constitutional right that no person can be legally divested of his property without remuneration or against his will, unless he is allowed a hearing before an impartial tribunal, or he may contest the claim set up against him, and be allowed to meet it on the law and the facts."

And that such proceeding "makes the company judge in its own case, and impowers it to execute its own judgments. Such a proceeding is too plainly illegal to admit of extended argument."

In *Stoddard* v. *Moulthrop*, 9 Conn., 502, the statute directing the appointment of commissioners upon insolvent estates, and providing for their qualifications, is conversant with judicial offices only, and the disinterestedness, therefore, required of them must be the disinterestedness of a judge, and not that of a witness, and we have seen that, by the law of the state, a judge cannot be disinterested who stands in so near a relationship to the parties interested, as that of brother and brother, by nature or marriage.

In *Earl* v. *Stocker*, 2 Vernon, 251, an award was set aside, one of the arbitrators appearing to have an interest in the cargo touching which the award was made.

In *Regina* v. *Aberdare Canal Co.*, 14 A. & E. (N. S.), 854, where, under a statute, commissioners were appointed for settling all questions and differences between the company and the land owners whose land was affected, and, although the statute provides that all persons having certain property interests were appointed commissioners for settling all questions and differences between the canal company and the land

owners, still, where the chairman, directors and shareholders of the railway company whose lands were therein affected, acted in such commission, the court held that the action of such commissioners was illegal.

In *Regina* v. *Recorder of Cambridge*, 8 E. & B., 637, upon an appeal to the quarter sessions of the borough of Cambridge, by a water company against an assessment to the poor rate, the deputy recorder of the borough presiding, the rate was reduced and costs given to the appellants. At the time of hearing the appeal, the deputy recorder was a shareholder in the company, and although he had in fact sold his shares, he had not completed the transfer of them. He was held incompetent to try the appeal.

In *Walcott* v. *Ely*, 2 Allen (Mass.), 338, it was held that the appointment by an officer of a son-in law of a judgment creditor as an appraiser of land seized on execution rendered void a levy based on an appraisement by him.

In *McGough* v. *Wellington*, 6 Allen (Mass.), 505, it was held that a sale of attached property, upon an appraisement in which a brother of the attaching creditor was appointed an appraiser by the officer, was void.

It is not our intention to cite or quote other cases. Numerous references are made to such cases in Notes to Broom's Legal Maxims, 118, and Volume 12 Amer. & Eng. Ency. Law, 44.

In the latter it is said:

"The rule of disqualification for the causes indicated is broad, and is applied to all classes of cases where *one* is appointed to decide between conflicting rights."

These cases cited fully support the text.

In *Ry. Co.* v. *Minnesota*, 134 U. S., 418, this court held that where, under a statute, commissioners were appointed,

29195



whose rates, when established, were final, and from whose decision no resort could be had to a court of law or equity, and although such parties could appear before the commissioner and be heard, such act was unconstitutional and void.

Is the act of 1891, which, in reality, depriving plaintiff in error from the right to resort to a court of equity to prevent abuse of unjust rates and which authorizes a party to a contract in violation of and in abrogation of this settled principle of the common law, any the less void? The defendant in error, standing in the capacity of a private corporation, cannot, in violation of that rule, establish rates which it shall pay.

Suppose the positions of the parties were reversed, and the statute authorized plaintiff in error to establish what it thought was reasonable rates, notwithstanding the terms of his contract? Would not such a position strike one as abhorrent to the law, and clearly against the doctrine that no person should be judge of his own case? The same principle is applicable to either party to a contract alike.

Under the authorities, therefore, the fact that a municipality, as a private individual (not acting in its sovereign capacity), is appointed to pass upon its own rights, renders the whole act of 1891 void.

Where there is no valid statute, however, as here, by reason of the interest of defendant in error making void the entire statute, there is nothing for the court to review.

A void law "is, in legal contemplation, as inoperative as if it had never been passed."

Virginia Coupon Cases, 114 U. S., 269.
*Norton* v. *Shelby County*, 118 U. S., 425.

The statute being void cannot be made valid from the fact that defendant in error requested plaintiff in error to appear

before it. Defendant in error was none the less judge in its own case, even if plaintiff in error had appeared before it, which it did not do.

We are not here asserting that the municipal authorities of the City of Freeport, in establishing such water rates, were guilty of any fraudulent action. But we do insist that under the law the parties establishing such rates should be above suspicion. They should not be placed in a position where they are subjected to any influence or are liable to lose their independence.

"And without intelligence and independence," says Mr. Justice Redfield (*supra*, 115 ), "such commissions might become an instrument of wrong and injustice, more effective, perhaps, than the ordinary legislative committee."

(4) It will be claimed that the doctrine contended for by us relates solely to and is applicable to judicial bodies only.

We contend that, independent of the 14th amendment to the constitution of the United States, it was not within the power of the legislature, as stated by Mr. Cooley, to do away with the rule of law that no one shall be judge in his own case.

It is certainly so established in this court as the law, since the passage of the 14th amendment to the constitution of the United States.

Says Mr. Justice STRONG, in delivering the opinion in *Ex parte Virginia*, 100 U. S., 339:

"Nor does it make any difference that such legislation is restrictive of what the state might have done before the constitutional amendment was adopted. The prohibitions of the 14th amendment are directed to the states, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth, *whether that action be executive, legislative or judicial.*

* * * * *

We have said the prohibitions of the 14th amendment are addressed to the states. They are: 'No state shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.' *They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way.* The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; *and as he acts in the name and for the state, and is clothed in the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it.*

But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a state, and upon the persons who are the agents of the state in the denial of the rights which were intended to be secured."

That these constitutional prohibitions extend to all acts of the state whatever their source, whether through its *legislative*, its executive or judicial authorities, as stated in *Ex Parte Virginia*, has been repeatedly held and recognized by this court.

*Virginia* v. *Reeves*, 100 U. S., 313.
*Neal* v. *Delaware*, 103 U. S., 370.
*Yick Wo* v. *Hopkins*, 118 U. S., 356.
*Gibson* v. *Mississippi*, 162 U. S., 565.
*Blake* v. *McClurg*, 172 U. S., 260.

Says Mr. Justice GRAY, in *Scott* v. *McNeal*, 154 U. S., 45, when speaking of the fourteenth article of the amendment to the constitution of the United States:

"These prohibitions extend to all acts of the state, whether through its *legislative*, its executive, or its judicial authorities. *Virginia* v. *Rives*, 100 U. S., 313, 318, 319; *Ex parte Virginia*, 100 U. S., 339, 346; *Neal* v. *Delaware*, 103 U. S., 370, 397. And the first one, as said by Chief Justice Waite in *United States* v. *Cruikshank*, 92 U. S., 542, 554, repeating the words of Mr. Justice Johnson in *Bank of Columbia* v. *Okely*, 4 Wheat., 235, 244, was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Blackstone says laws of nature, *leges legum*, are superior in obligation to any other. No human laws are of any validity if contrary to them. (*Supra.*)

The rule is as applicable to the state itself as to the humblest citizen—it is universal. The constitution does not attempt to abolish the rule. The rule, though not written, was incorporated in the constitution, and the legislature, equally with the judiciary, are bound by it.

B.

(1) The contract between Shelton and defendant in error was for the entire period of thirty years. When Shelton made such contract, he assumed the risks incident to changes in circumstances during such period, be such change great or small. He did not contract with defendant in error that it should increase his risk except as stated in the contract. He did not contract that defendant in error should, of its own volition, diminish the rentals as here in the case at bar, reducing such rates, in many instances, to less than one-half of those contracted for.

29197



Shelton's rights under such contract were property rights.

2 Kent's Com., 251.

In *Rigney* v. *City of Chicago*, 102 Ill., 77, the court say:

"Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particuler things or subjects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which it is used in the constitution."

In *Chicago & Western Indiana R. R.* v. *Englewood, etc., R. R. Co.*, 115 Ill., 385, it is said:

"Property itself, in a legal sense, is nothing more than the exclusive right to possession, of enjoying and disposing of a thing which, of course, includes the use of the thing."

In the Sinking Fund Cases, 99 U. S., 700, Mr. Justice STRONG discusses due process of law, and what is property, and says:

"What is property? What is the common understanding of the term? It is, in reference to its subject, whatever a person can possess and enjoy by right, and the person who has that right has the property. The subject may be corporeal or incorporeal. A right in action is as completely property as is a title to land. A very large portion of the property of the country consists in rights attendant upon contract. * * * Indeed, it may be said that whatever rights are created by contract, or held under it, if they relate to property, are themselves, in a very just sense, property, and as such are protected by the fifth amendment to the constitution."

(2) Such property rights cannot be legislated away *in invitim*. That they cannot be taken for private use needs no authority to support the proposition. That they cannot be taken for public use without due compensation is equally well settled.

The defendant in error does not claim that the property rights of plaintiff in error were taken under the ordinance of February 10, 1896, for private use.

But plaintiff in error does insist that its property rights were taken for private use and that the property rights of plaintiff in error were taken *in invitim* by the state, and given to the municipality without any compensation whatever.

The only ground under which defendant in error justifies the taking at all is under what it claims as the reserved police power of the state. This police power could only be exercised because the public had the right to use and regulate the use of the property rights of plaintiff under the contract. We have already shown that the state it did not have such power.

Even if defendant in error had such power, the property rights of plaintiff in error could be taken only upon making plaintiff in error full compensation for the property so taken. No claim is made that any compensation was paid plaintiff in error for the property rights so taken. It is admitted by defendant in error that no compensation was paid therefor. Such property rights of plaintiff in error were taken without any compensation being paid therefor and it was deprived of its property without due process of law.

Says Mr. Justice SCOTT, in *Lake View* v. *Rosehill Cemetery Co.*, 70 Ill., 198:

"Under the power to regulate, the state cannot deprive the citizen of the lawful use of his property if it does not injuriously affect or endanger others. Among the beneficent provisions of Magna Charta is the protection guaranteed the subject in the free enjoyment of his life, liberty and property, except as the same might be declared forfeited by the judgment of his peers or the law of the land. This cardinal principle has been embodied in the constitutions of all the American states, and by a recent amendment it is now incorporated in the Federal constitution. In view of this constitutional guaranty it cannot be said that every legislative enactment that affects the interest of the citizen is necessarily the 'law of the land.' Such a construction would render nugatory every constitutional provision intended for the protection of private property.

If a person is to be deprived of his private property it must be by the exercise of the right of eminent domain, and in all such cases just compensation must be made."

In *Board of Education* v. *Blakewell*, 122 Ill., 348, the court, quoting from *Westervelt* v. *Gregg*, 2 Kern, 209, say:

"Due process of law undoubtedly means, in the due course of legal proceedings, *according to those rules and forms which have been established for the protection of private rights.* Such an act as the legislature may in the uncontrolled exercise of its power think fit to pass is in no sense the process of law designated by the constitution."

As was said by Mr. Chief Justice WAITE in the Railroad Commission Cases, 116 U. S., p. 331:

"It is not to be inferred that this power of limitation is without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which in law amounts to taking of private property for public use without just compensation or without due process of law."

These words have been quoted and this doctrine approved in numerous cases in this court.

In *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166, Mr. Justice MILLER says:

"It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not

taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

*Monongahela Navigation Co.* v. *United States*, 148 U. S., 324:

Says Mr. Justice BREWER:

"In the case of *Sinnickson* v. *Johnson*, 17 N. J. L. (2 Harr.), 129, 145, cited in the case of *Pumpelly* v. *Green Bay Company*, 13 Wall., 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and *it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.*'

And in *Gardner* v. *Newburgh*, 2 Johns. Ch., 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in nowise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

But we need not have recourse to this natural equity, nor is it necessary to look through the constitution to the affirmations lying behind it in the Declaration of Independence, for, in this fifth amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court, in *Boyd* v *The United States*, 116 U. S., 616, 635:

'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight

deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.* Their motto should be *obsta principiis.*' "

Mr. Justice BREWER says, in *Chicago, Milwaukee, etc., Ry. v. Tompkins*, 176 U. S., 172:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. *It has often been said that this is a government of laws and not of men;* and by this court, in *Yick Wo v. Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their developement, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' "

If, as has been repeatedly stated in this court, this government is "a government of laws" and not of men, or an unlawful body of men representing the legislature, then if the rights of plaintiff in error are to be taken or destroyed, it must be compensated therefor, and its damages ascertained by due process of law.

Mr. Webster, in his argument in the *Dartmouth College* case, has given that definition of "due process of law" which has received the approval of this court, and has been adopted by all the commentators upon constitutional law. He says:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds on inquiry, and enters judgment only after trial. The meaning

is, that every citizen shall hold his life, liberty and property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, the acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures of all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general, permanent law for courts to administer or men to live under." (8 Wheaton, pp. 581, 582.)

Lord Coke, in commenting on the 29th chapter of *Magna Charta*, says: 'No man shall be disseized, etc., unless it be by the lawful judgment, that is, verdict of equals; or by the law of the land, that is, to speak at once for all, *by the due course and process of law.*' 2 Coke, Inst. 46.

This court says in *Murray* v *Hoboken Land and Improvement Co.*, 18 How., 276: The words, 'due process of law,' were undoubtedly intended to convey the same meanings as the words 'by the law of the land,' in *Magna Charta.*"

This definition has been repeatedly approved by this court.

It is provided in section 13, article 2, of the constitution of Illinois, that

"Private property shall not be taken or damaged for public use without just compensation, which such compensation when not made by the state shall be ascertained by a jury as shall be prescribed by law."

Starr & Curtis Stat., p. 113.

When the legislature, through the instrumentality of its agent, *i. e.*, the municipality, passed the ordinance of February 10, 1896, reducing the water rates to be charged thereafter by plaintiff in error, it took from plaintiff in error its property rights lawfully acquired under its contract.

In some instances the reduction amounted to 60 per cent.

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and in none less than 10 per cent. from the stipulated and agreed price.

Suppose the municipality had, on the same day, passed an ordinance declaring that the water mains, pipes and hydrants in one of the three wards of the city were, and from thenceforth should be, the property of the municipality, would such act have been any less a taking of the property of plaintiff in error than depriving it of the rentals for which it had lawfully contracted?

(3) No compensation has been offered or attempted to be ascertained by legislative enactment or by judicial inquiry for the property rights so taken from plaintiff in error. No compensation has been paid or attempted to be paid plaintiff in error for such damages, or property so taken.

Without such compensation being made, plaintiff is deprived of his property without due process of law.

This question also came up before Judge JACKSON in *Scott* v. *City of Toledo*, 36 F. R., 395, who there says:

"The single question is therefore presented whether, in the taking of private property for public use, 'due process of law' requires that compensation shall be made to the owner for the property so appropriated. In other words, may a state, or any subordinate division thereof, since the adoption of the fourteenth amendment of the constitution of the United States, take the property of its citizen for public purposes without making him compensation therefor? Does 'due process of law,' without which the citizen cannot, under this fourteenth amendment, be deprived of his property by the state, involve as a necessary and essential ingredient the payment or the making of compensation for private property appriated to public use. * * *

Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution, it seems clear that since that amendment went into effect such limitations and restraints have been placed upon their power

in dealing with individual rights that the states cannot now lawfully appropriate private property without compensation to the owner; and that *any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment.* The conclusion of the court on this question is that since the adoption of the fourteenth amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, *no matter under what form of procedure it is taken*, would violate the provisions of the Federal constitution. There is no difference in principle between the case put by Mr. Justice Miller, as an illustration, in *Davidson* v. *New Orleans*, 96 U. S., 102, viz., *the taking property from A and vesting it in B, and the taking of property from an individual and vesting it in the public. 'Due process of law' is equally wanting in both cases; in the latter case, because such a taking, without making compensation to the owner, is nothing short of legalized robbery, or confiscation for the benefit of the public.*"

This matter was very fully gone over and discussed in *C. B. & Q. R. R.* v. *Chicago*, 166 U. S., 226. Mr. Justice HARLAN, delivering the opinion of the court, says:

"It is proper now to inquire whether the due process of law enjoined by the fourteenth amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state.

In *Davidson* v. *New Orleans*, above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the fourteenth amendment. See also *Missouri Pacific Railway* v. *Nebraska*, 164 U. S., 403,

417. *Such an enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation.* Due protection of the rights of property has been regarded as a vital prineiple of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on constitutional law says, 'is that of enjoying private property without undue interference or molestation.' (p. 228.) *The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property.* It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' 2 Story Const., § 1790; 1 Bl. Com., 138, 139; Cooley's Const. Lim., *559; *People* v. *Platt*, 17 Johns., 195, 215; *Bradshaw* v. *Rodgers*, 20 Johns., 103, 106; Petition of Mt. Washington Road Co., 35 N. H., 134, 142; *Parham* v. *The Justices, etc.*, 9 Georgia, 341, 348; *Martin et al., Ex parte*, 13 Arkansas, 198, 206 *et. seq.*; *Johnston* v. *Rankin*, 70 N. C., 550, 555.

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, *but it is not due process of law if provision be not made for compensation.* Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. *Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right*

*of the owner to be compensated if his property be wrested from him and transferred to the public.* The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. * * *

The conclusion of the court on this question is, that since the adoption of the fourteenth amendment, *compensation for private property taken for public uses constitutes an essential element in 'due process of law,'* and that without such compensation the appropriation of private property for public uses, *no matter under what form of procedure* it is taken, would violate the provisions of the Federal constitution. To the same effect are *Henderson* v. *Central Passenger Railway*, 21 F. R., 358, and *Baker* v. *Village of Norwood*, 74 F. R., 997."

"No provision (was) made for compensation" to plaintiff in error in the act under which it was deprived of its property.

Judge COOLEY, in his discussion of the provisions of the fourteenth amendment, in chapter XLVII of the fifth edition of Story on the Constitution, says (2 Story on Con. (5th Ed.), p. 676, at pp. 702–703, Sec. 1956):

"The power to appropriate is subject to certain restrictions. It must not be exercised without making due compensation for whatever is taken. No more must be appropriated than is necessary, and if compensation is not agreed upon it *must be assessed by some impartial tribunal*, and cannot be arbitrarily fixed by state authority. In this, as well as in all other cases in which the owner may be deprived of his property by proceedings *in invitum*, the law authorizing such proceedings must be complied with in all its essential requirements, or p. oceedings will be ineffectual. (Citing *Williams* v. *Peyton*, 4 Wheat., 77; *Thatcher* v. *Powell*, 6 Wheat., 119; *Beaty* v. *Knowles*, 4 Pet., 168; *Early* v. *Doe*, 16 How., 610; *Rule* v. *Parker*, 1 Cooke, 365; *Parker* v. *Overman*, 18 How., 137.) Due process of law requires, *first*, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed, and, *secondly*, that the parties proceeding to make the appropria-

tion shall keep within the authority conferred and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waiver. (Citing: 1 Redfield on Railw., 239, 241; Cooley's Const. Lim., Ch. 15; Potter's Dwarris Statutes, Ch. 11.) The propriety of these rules is too obvious to require any discussion or elucidation."

To the same effect is

1 Hare's American Const. Law, pp. 347–348.

There is no pretense that in the case at bar any steps were taken to ascertain the value of the property rights of plaintiff in error upon the passage of ordinance of February 10, 1896.

That such ordinance does take the property of complainant without due process of law is also supported by the following cases:

*Mount Hope Cemetery* v. *Boston*, 158 Mass., 509.
*Sinneckson* v. *Johnson*, 17 N. J. L., 129.
*Gardner* v. *Newbury*, 2 Johns. Ch., 162.
*Harness* v. *C. & O. C. Co.*, 1 Md., Ch. Dec., 249.
*Martin et al. ex parte*, 8 Eng. (Ark.), 199.
*Henderson* v. *Ry. Co.*, 21 F. R., 358.
*Baker* v. *Norwood*, 74 F. R., 997.
*Davidson* v. *New Orleans*, 96 U. S., 102.
*Kentucky Railroad Tax Cases*, 115 U. S., 331.

New Memphis Gas & Light Co. v. City of Memphis 72 F. R. 952

We contend that the ordinance of February 10, 1896, does take the property of complainant *without due proces of law*, in this:

(1) The legislature through—'a collection of persons,'—a

body of men, authorizes such body of men, a party to a civil contract, to sit in judgment in its own case.

(2) The legislature, without making any compensation to plaintiff in error, takes the property rights of plaintiff in error, and surrenders and delivers them to defendant in error, the other party to the contract with plaintiff in error.

(3) If, as contended for by defendant in error, section 9 of the incorporation act applies to plaintiff in error, and not to individuals conducting business in like circumstances, then it imposes on plaintiff in error a burden which is not uniform upon all persons in like circumstances.

Therefore the ordinance of February 10, 1896, passed in pursuance of the act of the legislature of the State of Illinois passed in 1891, is in violation of section 10, article 14, of the amendments to the constitution of the United States of America.

Our only apology for this apparently lengthy argument is that we are here asking the reversal of a judgment of the highest court of the State of Illinois, whose decision, while entitled to the greatest consideration, we believe, is in contravention of the constitution of the United States, and we would be derelict in our duty in making such request did we not attempt to aid this court in its deliberations by a statement and elucidation of those principles and authorities which we believe lie at the foundation of the questions involved, and meet questions raised in argument below, and which we may, therefore, assume will be again urged here.

We think we have clearly demonstrated that the ordinance of February 10, 1896, passed in pursuance of the statute of 1891, did impair the contract of June 7, 1882, within the provisions of the Federal constitution which prohibits an im-

pairment of contracts; and that the property of plaintiff in error should not be taken without due process of law.

We respectfully submit that the judgment rendered in the case at bar by the Supreme Court of the State of Illinois should be reversed.

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